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PETITIONER'S DESIGNATION AS TO PRINTING RECORD.

Filed Jan. 23/48.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 12,232.

W. O. CULBERTSON AND GLADYS CULBERTSON,
Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

Now come the Appellants, by their attorney of record, and, pursuant to Rule 23 of the Rules of United States Circuit Court for the Fifth Circuit, respectfully request that the following portion of the record be printed in this case:

The entire record, with the following exceptions:

1. The original petitions and answers filed in Tax Court Dockets 4184 and 4185. These petitions and answers are unnecessary because the same were superseded by amended petitions and answers;

2. The amended petition (together with the deficiency notice attached thereto) of Petitioner, Glayds Culbertson, in Tax Court Docket 4185 and the Respondent's answer thereto. The printing of this petition and answer is unnecessary for the reason that the same are identical with

the amended petition and answer in Docket 4184, with the exception of the petitioner's name, the taxes in controversy (as to Gladys Culberton, 1940—$437.02, and 1941—$8,756.34), an allegation that all property and income of petitioners in 1940 and 1941 were community property, that such parties were husband and wife during such years, and that W. O. Culbertson handled on behalf of the community the various affairs, transactions and activities pertinent to the issue;

3. Respondent's Exhibit B;

4. Respondent's Exhibit C;

5. Respondent's Exhibit D;

6. Respondent's Exhibit E;

7. Respondent's Exhibit F.

Such Exhibits B through F are quite voluminous and only a small portion of each (which will perhaps be designated by the Appellee) is pertinent to the issues here involved.

It is therefore respectfully requested that the original petitions and answers in these cases, and the amended petition and answer in Docket No. 4185, and that Respondent's Exhibits B, C, D, E and F be not printed, but that the same remain available to the Court for inspection, if such inspection is necessary.

Respectfully submitted,

(Signed) BENJAMIN L. BIRD,
Attorney for Appellants.

909-13 Sinclair Building,
Fort Worth, Texas.

State of Texas,
County of Tarrant.

Before me, the undersigned notary public on this Jan. 20, 1948, appeared Benj. L. Bird, who upon being duly sworn stated that he personally deposited in the United States mails, properly stamped, a copy of the foregoing designation, addressed to the Attorney General, Department of Justice, attention Mr. Theron L. Caudle, Washington, D. C., on January 20, 1948.

(Signed) BENJAMIN L. BIRD.

Subscribed and sworn to before me this 20th day of January, 1948.

(Signed) MAMIE MORSE,
(Seal) Notary Public, Tarrant County, Texas.

LETTER OF COUNSEL FOR PETITIONERS STATING THAT THERE IS NO ESSENTIAL DISAGREEMENT BETWEEN THE PARTIES.

Filed Feb. 16, 1948.

#12,232.

Weeks, Bird, Cannon & Appleman.

February 13, 1948.

Mr. Oakley F. Dodd, Clerk,
United States Circuit Court of Appeals,
New Orleans 6, Louisiana.

Re: No. 12232 Culberton vs. Commissioner.

Dear Mr. Dodd:

I acknowledge with appreciation your letter of February 11th dealing with the record to be printed on the above

case. As I understand it, you have before you my request—"Designation of Portions of Record to be Printed" sent to you on or about January 20th, and you have the Attorney General's request—"Designation of Additional Portions of Record to be Printed"—sent to you on or about January 28th, and from these two you will determine the portions of the record to be printed. As I read the two designations there is no essential disagreement between the parties as to what should be printed. Upon reading the two designations together it appears that the entire record should be printed with the following exceptions:

1. The original petitions and answers filed in Tax Court dockets 4184 and 4185;

2. The amended petition, together with the Deficiency notice attached thereto, of Petitioner Glayds Culbertson in Tax Court docket 4185 and the Respondent's answer thereto;

3. Respondent's Exhibit B.

4. Respondent's Exhibit C (being the transcript of evidence in W. O. Culbertson, Jr., et al. vs. W. O. Culbertson, Sr., No. 3040, in the District Court of Dallam County, Texas) with the exception of (that is the following parts of Exhibit C should be printed:) the caption and appearances on page 2, pages 3 and 4, the first six lines of page 5, pages 18-21 inclusive and page 29.

5. Respondent's Exhibit F.

You will note that the Attorney General's designation is in agreement with my designation with the exception that he desires Respondent's Exhibit D and E, and the indi-

cated part of Respondent's Exhibit C, printed. I have no objection whatsoever to the printing of the exhibits and the part of Exhibit C covered by the Attorney General's designation.

Yours very truly,
B. L. BIRD,
(Benjamin L. Bird).

BLB-mj.

cc: Attorney General,
Department of Justice,
Washington, D. C.
Attention: Mr. Theron L. Caudle.

DESIGNATION OF RESPONDENT AS TO PRINTING RECORD.

Filed Jan. 30, 1948.

In the United States Circuit Court of Appeals for the Fifth Circuit.

W. O. Culbertson and Gladys Culbertson, Petitioners,
vs. No. 12,232.
Commissioner of Internal Revenue, Respondent.

The respondent, by his attorney, pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Fiffth Circuit, respectfully requests that the following portions of the record be printed, in addition to the portions designated by the petitioner:

1. The following parts of respondent's Exhibit C, being the transcript of evidence in W. O. Culbertson, Jr., et al.,

v. W. O. Culbertson, Sr., No. 3040, in the District Court of Dallam County, Texas: the caption and appearances on page 2; pages 3 and 4, and the first six lines of page 5; pages 18 to 21, inclusive; page 29.

2. Respondent's Exhibits D and E, being the partnership income tax returns for the years 1940 and 1941 filed by W. O. Culbertson and Sons.

Respectfully submitted,
(Signed) THERON L. CAUDLE,
(Theron L. Caudle),
Assistant Attorney General,
Attorney for Respondent.

January 28, 1948.

DOCKET ENTRIES.

William O. Culbertson, Sr., Petitioner,
vs. Docket No. 4184.
Commissioner of Internal Revenue, Respondent.

Appearances.

For Taxpayer:
Y. D. Harrison, Jr.,
Benjamin L. Bird,
Harry C. Weeks,
R. B. Cannon,
Frank B. Appleman.

For Comm'r:
J. Marvin Kelley.

1944.
Mar. 6—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 6—Copy of petition served on General Counsel.
Apr. 25—Answer filed by General Counsel.
Apr. 25—Request for hearing in Dallas, Texas, filed by General Counsel.
Apr. 29—Notice issued placing proceeding on Dallas, Texas, calendar. Service of answer and request made.
Aug. 9—Hearing set Sept. 25, 1944, Dallas, Texas.
Aug. 24—Motion for continuance of hearing to a later date filed by taxpayer. 8/26/44 Granted ex parte.

1946.

Sept. 16—Notice proceeding transferred from U. S. A. F. to Dallas, Texas, calendar.
Sept. 18—Hearing set 11/12/46, Dallas, Texas.
Oct. 14—Appearance of Benjamin L. Bird, Harry C. Weeks, R. B. Cannon and Frank B. Appleman as counsel filed.
Oct. 14—Designation of attorney for service as Benjamin L. Bird, as counsel of record filed by Y. D. Harrison, Jr.
Oct. 24—Motion for leave to file amended petition, filed by taxpayer. Amended petition lodged.
Oct. 28—Copy of motion and amended petition served on General Counsel.
Nov. 12—Hearing had before Judge Disney on merits.
and 13 Motion of counsel to consolidate granted. Petitioner's motion to file amended petition granted. Respondent's motion to answer amended petition granted. Motion to file and amended petitions filed. Copies served. Motion for leave to file and amended answers filed. Copies served. Petitioner's brief due 12/15/46. Respondent's brief due 1/15/46. Petitioner's reply due 2/1/47.

Dec. 10—Motion for extension to Jan. 1, 1947, to file brief filed by taxpayer. 12/11/46 Granted.
Dec. 23—Motion for extension to Jan. 15, 1947, to file brief filed by taxpayer. 12/23/46 Granted.
Dec. 23—Transcript of hearing 11/12/46 filed.
Dec. 23—Transcript of hearing 11/13/46 filed.

1947.

Jan. 13—Brief filed by taxpayer. 1/13/47 copy served.
Jan. 16—Motion for leave to file briefs as amicus curiae within 20 days filed by Joe G. Montague, attorney for Texas and Southwestern Cattle Raisers' Association. 1/16/47 Granted.
Feb. 17—Motion for extension to 2/28/47 to file brief filed by General Counsel. 2/19/47 Granted.
Feb. 27—Reply brief filed by General Counsel. Served.
Mar. 10—Reply brief filed by taxpayer. 3/10/47 copy served.
June 24—Memorandum Findings of Fact and Opinion rendered, Judge Disney. Decision will be entered under Rule 50. Copy served.
July 23—Computation for entry of decision filed by General Counsel.
July 28—Computation for entry of decision filed by taxpayer.
Aug. 6—Decision entered, Judge Kern, Div. 16.
Oct. 13—Petition for review by U. S. Circuit Court of Appeals for the Fifth Circuit with assignments of error filed by taxpayer.
Oct. 14—Proof of service filed.
Oct. 16—Stipulation for consolidation on petition for review filed.
Nov. 21—Agreed statement of evidence lodged.
Nov. 21—Agreed praecipe for record filed.
Dec. 9—Order, extending the time to 1/30/48 to prepare and transmit the record, entered.
Dec. 22—Agreed statement of evidence filed.

DOCKET ENTRIES.

Gladys Culbertson, Petitioner,
vs. Docket No. 4185.
Commissioner of Internal Revenue, Respondent.

Appearances.

For Taxpayer:
Y. D. Harrison, Jr.,
Benjamin L. Bird,
Harry C. Weeks,
R. B. Cannon,
Frank B. Appleman.

For Comm'r:
J. Marvin Kelley.

1944.

Mar. 6—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 6—Copy of petition served on General Counsel.

Apr. 25—Answer filed by General Counsel.

Apr. 25—Request for hearing in Dallas, Texas, filed by General Counsel.

Apr. 29—Notice issued placing proceeding on Dallas, Texas, calendar. Service of answer and request made.

Aug. 9—Hearing set Sept. 25, 1944, Dallas, Texas.

Aug. 24—Motion for continuance of hearing to a later date filed by taxpayer. 8/26/44 Granted ex parte.

1946.

Sept. 16—Notice transferring proceeding from U. S. A. F. calendar to Dallas, Texas, calendar.

Sept. 18—Hearing set 11/12/46, Dallas, Texas.
Oct. 14—Appearance of Benjamin L. Bird, Harry C. Weeks, R. B. Cannon and Frank B. Appleman, as counsel filed.
Oct. 14—Designation of attorney of record to be served, Benjamin L. Bird, as counsel filed by Y. D. Harrison, Jr.
Oct. 24—Motion for leave to file amended petition filed by taxpayer. Amended petition lodged.
Nov. 12—Hearing had before Judge Disney on merits.
and 13 Motion of counsel to consolidate granted. Petitioner's motion to file amended petition granted. Respondent's motion to answer amended petition granted. Motion to file and amended petitions filed. Copies served. Motion for leave to file and amended answers filed. Copies served. Petitioner's brief due 12/15/46; respondent's brief due 1/15/47. Petitioner's reply brief due 2/1/47.
Dec. 10—Motion for extension to 1/1/47 to file brief filed by taxpayer. 12/11/46 Granted.
Dec. 23—Motion for extension to 1/15/47 to file brief filed by taxpayer. 12/23/46 Granted.
Dec. 23—Transcript of hearing 11/12/46 filed.
Dec. 23—Transcript of hearing 11/13/46 filed.

1947.

Jan. 13—Brief filed by taxpayer. 1/13/47 copy served.
Jan. 16—Motion for leave to file brief as Amicus Curiae within 20 days filed by Joe G. Montague, attorney for Texas and Southwestern Cattle Raisers' Association. 1/16/47 Granted.
Feb. 17—Motion for extension to 2/28/47 to file brief filed by General Counsel. 2/19/47 Granted.
Feb. 27—Reply brief filed by General Counsel.
Mar. 10—Reply brief filed by taxpayer. 3/10/47 copy served.

June 24—Memorandum Findings of Fact and Opinion rendered, Judge Disney. Decision will be entered under Rule 50. Copy served.

July 23—Computation for entry of decision filed by General Counsel.

July 28—Computation for entry of decision filed by taxpayer.

Aug. 6—Decision entered, Judge Kern, Div. 16.

Oct. 13—Petition for review by U. S. Circuit Court of Appeals for the Fifth Circuit with assignments of error filed by taxpayer.

Oct. 14—Proof of service filed.

Oct. 16—Stipulation for consolidation of petition for review filed.

Nov. 21—Agreed statement of evidence lodged.

Nov. 21—Agreed praecipe for record filed.

Dec. 9—Order, extending the time to 1/30/48 to prepare and transmit the record, entered.

Dec. 22—Agreed statement of evidence filed.

Petition in Case No. 4184, with Exhibits "A and B" attached, Omitted from the Printed Record, pursuant to Designations of Counsel as to Printing Record, copied at pages 1 and 5.

Answer in Case No. 4184, Omitted from the Printed Record, Pursuant to Designations of Counsel as to Printing Record, copied at pages 1 and 5.

AMENDED PETITION.

Received Oct. 24, 1946.

Lodged Oct. 24, 1946.

Filed at Hearing Nov. 12, 1946.

The Tax Court of the United States.

W. O. Culbertson, Sr., Petitioner,
vs. Docket No. 4184.
Commissioner of Internal Revenue, Respondent.

Pursuant to authority granted by the Court to amend his petition, W. O. Culbertson, Sr., Petitioner, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Dallas:IRA:'90 D-D) dated December 17, 1943, and as a basis for his proceeding alleges as follows:

1. The petitioner is an individual residing at Dalhart, Dallam County, Texas. The returns for the periods, 1940 and 1941, here involved were filed with the Collector of Internal Revenue for the Second Collection District of Texas at Dallas.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on December 17, 1943.

3. The taxes in controversy are income taxes for the calendar years 1940 and 1941 and are as follows:

Year	Deficiency
1940	$ 554.98
1941	$9,164.34

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in failing and refusing to recognize, for tax purposes, the existence and validity during the tax years of the partnership of W. O. Culbertson and sons composed of W. O. Culbertson, Sr., W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, and in taxing the entire net income of said partnership for 1940 and 1941 to petitioner on the community property basis;

(b) In the alternative, and if said partnership of W. O. Culbertson's sons is not recognized for tax purposes, then respondent erred in failing and refusing to tax the income arising from the cattle and assets of said partnership during 1940 and 1941 to the owners of such cattle and assets in accordance with their ownership therein, to-wit, W. O. Culbertson, Sr., four-eighths (4/8ths), (as community property of himself and wife), W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, each an undivided one-eighth (1/8th);

(c) In the alternative, the Commissioner erred in not allowing petitioner the statutory credits for dependents.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) In 1902 R. S. Coon began the breeding of fine pure blood Hereford cattle and the perfection of Herefords continued to be one of his principal interests until his death. In 1915, R. S. Coon and petitioner organized an equal partnership under the name of Coon & Culbertson to engage in the production, breeding and sale of cattle,

and particularly the breeding for perfection of pure blood Herefords. During the continuation of the partnership of Coon & Culbertson, R. S. Coon (who was childless) formed an attachment for the sons of W. O. Culbertson (hereinafter referred to as Culbertson's sons), W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, and frequently professed admiration for their abilities in handling and breeding cattle. In 1939, Coon was forced to retire from business activities due to his age and health and the partnership of Coon & Culbertson undertook a program of liquidation of their herd of Herefords—which was by general acceptance one of the finest herds of pure blood Herefords in the world. By October, 1939, practically all of the herd, with the exception of an unknown number, but then thought to be approximately 1400 head, of the finest stock had been sold; during October, 1939, petitioner offered to purchase Coon's one-half (1/2) interest in this stock at a per head price substantially less than could have been realized by sales in individual lots. Coon advised petitioner that with respect to this fine stock his primary desire was to assure its perpetuation and the continued breeding for perfection, that he knew of no better method of assuring such perpetuation than through securing the continued services and abilities of Culbertson's sons, who had grown up with the herd, by having them replace him in the partnership; that, therefore, he would accept petitioner's offer and the partnership of Coon & Culbertson would sell all of such fine stock to petitioner on condition that petitioner would in turn sell the Coon interest (an undivided one-half (½) interest) to Culbertson's sons for the same price which petitioner was paying Coon therefor. On November 4, 1939, after a tally of the cattle, Coon & Culbertson executed and delivered to petitioner its bill of sale, with full warranties of title, to the following cattle: 736 registered hereford cows, 2 to 8 years; 52 registered here-

ford heifers coming two; 607 pure bred hereford cows 2 to 8 years of age; 6 hereford heifers; 32 registered hereford bulls; Real Prince Domino 100th and Jay Hawker Domino, the latter two being prize hereford bulls, and petitioner executed and delivered to Coon & Culbertson his check for $99,440.00 in payment for such cattle; on November 6, 1939, petitioner executed and delivered to W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson his bill of sale, with full warranties of title, to an undivided one-half (½) interest in the cattle hereinabove described and said Culbertson's sons executed and delivered to petitioner their joint note for one-half (½) of the amount petitioner had paid to Coon & Culbertson. The said Culbertson's sons then took possession of said cattle. Following the execution and delivery of the aforesaid bill of sale and note, it was agreed by and between petitioner and W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson that said parties would engage in the cattle business as partners under the name of W. O. Culbertson & Sons, that each would contribute thereto his interest in said stock and that all gains and losses would be divided in proportion to the interests owned by each in the cattle, that is, petitioner four-eighths (4/8ths) and each of Culbertson's an undivided one-eighth (1/8th). Thereafter in operating said cattle partnership the division of responsibility and services was largely as follows: petition acted as representative of the partnership in maintaining its contacts with prospective buyers, securing publicity in the cattle industry, initiating sales and borrowing money, and Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, under the management and supervision of W. O. Culbertson, Jr., were responsible for the care, maintenance and breeding of the hereford herd, the delivery of sold cattle and the showing of cattle at Fairs and Shows. The ownership of Culbertson's sons

in said herd and the organization and existence of W. O. Culbertson & Sons was publicized by newspaper articles, letterheads, memberships in the American Hereford Association and otherwise. At the time of the organization of W. O. Culbertson & Sons, Joe Jack Culbertson and Eugene Culbertson were minors but they have since attained 21 years of age and all of the foregoing transactions have been ratified by them since attaining manhood. Between the conveyance of said interests in said cattle to Culbertson's sons on November 6, 1939, and January 1, 1940, the number of cattle which the partnership of W. O. Culbertson & Sons was to receive from Coon and Culbertson was temporarily increased and to cover these additions, grass leases, equipment and horses, the note given by Culbertson's sons to petitioner on November 6, 1939, was canceled and a new joint note in the sum of $57,674.80 was executed by each of Culbertson's sons and delivered to petitioner. Shortly thereafter and in January, 1940, due to an error in the number of cattle which W. O. Culbertson & Sons were to receive, this note was credited with the sum of $5,930.00 leaving a balance due of $51,744.80. During the remainder of 1940 and 1941 this balance due was paid by profits from the partnership and gifts from petitioner and his wife to said Culbertson's sons.

(b) Shortly after the conveyances aforesaid and the organization of W. O. Culbertson & Sons, petitioner on behalf of W. O. Culbertson & Sons took steps to secure the continuation of the line of credit with National Finance Credit Corporation, Fort Worth, Texas; which the partnership of Coon & Culbertson had enjoyed for many years, and in so doing petitioner advised A. A. Wright, Fort Worth Manager, and Weldon Howell, Amarillo representative, of said Credit Corporation, of petitioner's transaction with R. S. Coon, the conveyance of an unvided one-

half (½) interest to Culbertson's sons and the organization of W. O. Culbertson & Sons; Wright advised petitioner that the Credi. Corporation would extend and continue such line of credit but that as two of the partners in W. O. Culbertson & Sons were minors, petitioner should secure from his attorney a document which would pass the Finance Corporation's attorneys enabling the partnership, in the event large loans were required, to pledge the full title to the partnership's cattle. Thereafter, on or about December 5, 1939, petitioner advised his attorney, R. E. Stalcup, of the details of the transactions hereinbefore alleged and requested that he prepare a document to facilitate the borrowing of money from said Finance Corporation. The said attorney prepared a document for the signature of petitioner and his wife, Gladys Culbertson, which purported to convey an undivided one-half (½) interest in about 1400 cows, 35 head of bulls, 50 head of calves, 30 head of horses and certain ranch equipment to W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, subject to certain restrictions and conditions, as of January 1, 1940, and to create a limited partnership. Petitioner and his wife executed said document on December 8, 1939, and forwarded it to the National Finance Credit Corporation—the only use made of said document then or thereafter. In this connection petitioner would show that said document was intended solely to facilitate the borrowing of money as aforesaid and was not intended to alter or effect the preexisted ownership of Culbertson's sons in and to the aforesaid cattle or the preexisting partnership of W. O. Culbertson and Sons. Said document was not placed of record in Dallas County, Texas, or any other County and petitioner attached so little importance to said document that Culbertson's sons were not advised of its execution, did not consent to it and were unaware of its existence until after the beginning of the present

tax controversy in 1943. Upon being informed of the existence of said document and upon the advice of petitioner's attorney, the said Culbertson's sons filed a petition in the District Court of Dallas County (styled W. O. Culbertson, Jr., et al., vs. W. O. Culbertson, Sr. and Gladys Culbertson, No. 3040 on the docket of said Court) to determine, inter alia, the validity of such instrument. The defendants in said proceeding duly answered with respect thereto and on March 22, 1944, after a full trial, the said Court rendered a judgment finding and holding that by virtue of the transactions hereinabove alleged each of Culbertson's sons became the owners of an undivided one-eighth (1/8th) interest in said cattle as aforesaid, that the partnership of W. O. Culbertson & Sons from and after its organization in 1939 was valid and legal and that the document dated December 8, 1939, was entirely void. Said judgment has now become final and binding upon all parts thereto. Petitioner therefore alleges, upon information and belief, that said document of December 8, 1939, was is entirely void.

(c) In the alternative and if the Court should hold the aforesaid document of December 8, 1939, to be valid and effective, either as a conveyance or a trust, or as affecting the prior partnership of W. O. Culbertson & Sons, then petitioner alleges upon information and belief that legally said document could not have divested or limited the rights and titles in or to the cattle hereinbefore described vested prior to December 8, 1939, in Culbertson's sons but that at most the legal effect thereof was to divest petitioner and his said wife of all of their remaining undivided one-half (½) individual interest in the cattle therein described, and vest said remaining undivided one-half (½) interest in said Culbertson's sons subject to the terms and limitations of said instrument, and that therefore the respondent erred in determining

the deficiency shown in the notice of deficiency attached hereto as Exhibit "A".

(d) Petitioner would further show that without regard to the validity for tax purposes of said partnership of W. O. Culbertson & Sons and without regard to the validity of the aforesaid document of December 8, 1939, petitioner is not taxable upon more than his community share of fifty percent (50%) of the income of said partnership during the years 1940 and 1941 and thereafter for the following reasons:

Under petitioner's agreement with R. S. Coon, as hereinabove alleged, petitioner on November 6, 1939, conveyed without limitation or reservation an undivided one-half (½) interest in the aforesaid cattle to W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson and each of said individuals acquired an indefeasible title to an undivided one-eighth (1/8th) interest in said cattle; in and by said conveyance petitioner retained no liens on said one-half (½) undivided interest nor any species of title therein and Culbertson's sons acquired a fee simple title in and to said undivided one-half (½) interest. The income of W. O. Culbertson & Sons during the years 1940 and 1941 (one-half (½) of which respondent seeks herein to tax to petitioner and his wife) was derived from the aforesaid cattle. Petitioner therefore alleges, upon information and belief, that if the partnership of W. O. Culbertson and Sons is held invalid for tax purposes, then the income arising from said cattle in the taxable years is taxable to the owners of said cattle in proportion to their ownership therein, that is W. O. Culbertson and Gladys Culbertson, one-half (½), W. O. Culbertson, Jr., one-eighth (1/8th), Richard Culbertson, one-eighth (1/8th), Joe Jack Culbertson, one-eighth (1/8th) and Eugene Culbertson, one-eighth (1/8th), and respondent erred in determining the deficiency shown in the aforesaid deficiency notice.

(e) In the alternative, and in the event the respondent's determination of tax as set forth in the notice of deficiency is sustained, then petitioner alleges that he is entitled to the statutory credits for dependents with respect to all of his children who were minors during the taxable years, which respondent failed to allow in order to protect the government's interests.

Wherefore, the petitioner prays that this Court may hear this proceeding and hold that respondent erred in determining that the entire net income of the partnership of W. O. Culbertson & Sons constituted taxable income of petitioner and his wife on the community property basis for the years 1940 and 1941; and that respondent erred in failing to determine that said income for the years 1940 and 1941 was taxable in accordance with Section 181-184 of the *Internal Revenue Code*; or in the alternative, in accordance with the ownerships in the cattle and assets producing said 1940 and 1941 income, to-wit, petitioner, four-eights (4/8ths) (as community property) and W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, each one-eighth (1/8th).

W. O. CULBERTSON, SR.,
(W. O. Culbertson, Jr.),
Petitioner.

Dalhart, Texas.

BENJAMIN L. BIRD,
(Benjamin L. Bird),

Sinclair Building,
Fort Worth, Texas.

Y. D. HARRISON, JR.,
(Y. D. Harrison, Jr.),
Counsel for Petitioner.

State of Texas,
County of Dallam.

W. O. Culbertson, Sr., being duly sworn, says that he is the Petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements therein contained and that the statements contained therein are true except those stated to be upon information and belief and that those he believes to be true.

W. O. CULBERTSON, SR.,
(W. O. Culbertson, Sr.)

Subscribed and sworn to before me this 18th day of October, 1946.

MARIE A. MITCHELL,
Notary Public in and for
Dallas, County, Texas.

(Seal)

EXHIBIT A.

Dallas.
IRA:90D-D.

Directed by Dallas
Office SWD-TS.

Mr. W. O. Culbertson, Sr.,
Post Office Box 1410,
Dalhart, Texas.

Sir:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1940 and 1941, discloses a deficiency of $9,719.32, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at

its principal address, Washington, D. C., for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, 1200 Tower Petroleum Building, Dallas 1, Texas, for the attention of C:RLP. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
ROBERT E. HANNEGAN,
Commissioner,
By (Signed) B. W. WILDE,
Internal Revenue Agent in
Charge.

Enclosures:
Statement.
Form of waiver.
FRH/md.

STATEMENT.

Dallas.
IRA:90D-D.

Mr. W. O. Culbertson, Sr.
Post Office Box 1410,
Dalhart, Texas.

Income Tax Liability for the Taxable Years Ended December 31, 1940 and 1941.

Year	Liability	Assessed	Deficiency
1940	$ 685.70	$ 130.72	$ 554.98
1941	10,306.89	1,142.55	9,164.34
Totals	$10,992.59	$1,273.27	$9,719.32

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated September 14, 1942; to your protest dated December 17, 1942; and to the statements made at the conferences held on January 23 and March 22, 1943.

A copy of this letter and statement has been mailed to your representative, Mr. Y. D. Harrison, Jr., First National Bank Building, Fort Worth, Texas, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Taxable Year Ended December 31, 1940.

Adjustments to Net Income.

Net community income as disclosed by return	$ 9,441.85
Unallowable deductions and additional income:	
(a) Business income	18,281.92
Total	$27,723.77
Nontaxable income and additional deductions:	
(b) Partnership income	8,901.09
Net community income adjusted	$18,822.68
Less: One-half, community interest of your wife	9,411.34
Your net income adjusted	$9,411.34

Explanation of Adjustments.

(a) and (b) It has been determined that the taxable net income realized by the business enterprise, W. O.

Culbertson & Sons, constituted taxable income of you and your wife on the community property basis for the years 1940 and 1941 rather than income from a partnership consisting of you and your four sons for 1940; and of you, your four sons and daughter for 1941 as reported in your returns. The taxable net income as reported in your returns is, therefore, increased as follows:

Taxable net income as corrected...	$18,281.92	$67,981.48
Taxable net income as reported	8,901.09	23,475.48
Increase	$9,380.83	$44,506.00
Your share, 50%	$4,690.42	$22,253.00

The business net income is the same as the distributive income shown by the partnership return except that salaries and wages were understated in amount of $944.00 and depreciation deduction was overstated in the partnership return.

Net income as disclosed by partnership return..		$19,064.21
Adjustments:		
Salaries and wages increased....	$944.00	
Less: Depreciation disallowed...	161.71	782.29
Net business income as corrected.....		$18,281.92

In order to protect the interest of the Government under all circumstances no credit for dependents has been allowed.

Computation of Tax

1940.

Net income adjusted		$9,411.34
Less: Personal exemption		550.00
Balance (Surtax net income)		$8,861.34
Net income subject to normal tax		$8,861.34
Normal tax at 4% on $8,861.34	$354.45	
Surtax on $8,861.34	268.91	
Total tax		$ 623.36
Defense tax (10% of $623.36)		62.34
Total tax		$ 685.70
Correct income tax liability		$ 685.70
Income tax assessed, account #812556		130.72
Deficiency of income tax		$ 554.98

Taxable Year Ended December 31, 1941.

Adjustments to Net Income.

Net community income as disclosed by return	$16,676.68
Unallowable deductions and additional income:	
(a) Business income	67,981.48
Total	$84,858.16

Nontaxable income and additional deductions:	
(b) Partnership income	23,475.48
Net community income adjusted	$61,382.68
Less: One-half, community interest of your wife	30,691.34
Your net income adjusted	$30,691.34

(a) and (b) See explanation to items (a) and (b), for year 1940 hereinabove.

The business net income is the same as the distributive income shown by the partnership return filed, except that the inventory as at December 31, 1941, has been determined to be $236,687.90 instead of $232,826.00 (difference $3,861.90) reported, depreciation deducted in amount of $1,681.22 was overstated in amount of $313.57, and cost of supplies, etc., was overstated in amount of $4.68.

Net income as disclosed by partnership return	$63,801.33
Add: Closing inventory increased	3,861.90
Depreciation disallowed	313.57
Cost of supplies, etc., decreased	4.68
Net business income, as corrected	$67,981.48

You have been allowed a deduction of $350.00 personal exemption, your wife having been allowed $1,150.00, the remainder of the marital personal exemption.

Computation of Earned Income Credit.

	Husband	Wife
Earned Income:		
Income from business (Not in excess of 20% of $67,981.48)	$ 6,798.15	$ 6,798.15
Earned net income	$ 6,798.15	$ 6,798.15

Your entire net income	$30,691.34	$30,691.34
Earned income credit:		
(10% of $13,596.30)	$ 679.82	$ 679.82

Computation of Tax.

1941.

Net income adjusted		$30,691.34
Less: Personal exemption		350.00
Balance (Surtax net income)		$30,341.34
Less: Earned income credit		679.82
Net income subject to normal tax		$29,661.52
Normal tax at 4% on $29,661.52	$1,186.46	
Surtax on $30,341.34	9,120.43	
Total tax		$10,306.89
Correct income tax liability		$10,306.89
Income tax assessed, account #902870		1,142.55
Deficiency of income tax		$9,164.34

36 ANSWER TO AMENDED PETITION.

Filed at Hearing, Dallas, Texas, Nov. 12, 1946.

The Tax Court of the United States.

W. O. Culbertson, Sr., Petitioner,
vs. Docket No. 4184.
Commissioner of Internal Revenue, Respondent.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed in the above-entitled appeal, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the amended petition.

4 (a), (b) and (c). Denies that respondent's determination is based upon errors as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the amended petition.

5. (a). Admits that on November 4, 1939, after a tally of the cattle, Coon & Culbertson executed and delivered to petitioner its bill of sale, with full warranties of title, to the following cattle: 736 registered hereford cows, 2 to 6 years; 52 registered hereford heifers coming two; 607 pure bred hereford cows 2 to 8 years of age; 6 hereford heifers; 32 registered hereford bulls; Real Prince Domino 100th and Jay Hawker Domino, the latter two being prize hereford bulls, and petitioner executed and delivered to Coon & Culbertson his check for $99,400.00 in payment for such cattle. Denies the remaining material allegations of fact set forth in subparagraph (a) of paragraph 5 of the amended petition.

5 (b): Admits that R. E. Stalcup prepared a document for the signature of petitioner and his wife, Gladys Culbertson, which purported to convey an undivided one-half (½) interest in about 1400 cows, 35 head of bulls, 50 head of calves, 30 head of horses and certain ranch equipment to W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, subject to certain restrictions and conditions; as of January 1, 1940, and to create a limited partnership. Admits that petitioner and his wife executed said document on December 8, 1939. Denies the remaining material allegations of fact set forth in subparagraph (b) of paragraph 5 of the amended petition.

5 (c), (d) and (e). Denies the material allegations of fact set forth in subparagraphs (c), (d) and (e) of paragraph 5 of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be approved.

(Signed) J. P. WENCHEL, JMK.
(J. P. Wenchel),
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:
JAMES L. BACKSTROM,
Division Counsel.
J. MARVIN KELLEY,
Special Attorney,
Bureau of Internal Revenue.

JMK:jr. 11-5-46.

Petition in Case No. 4185, with Exhibits "A" and "B" attached, omitted from the Printed Record, pursuant to Designations of Counsel as to Printing Record, copied at pages 1 and 5.

* * * * * * *

Answer in Case No. 185, omitted from the Printed Record, pursuant to Designations of Counsel as to Printing Record, copned at pages 1 and 5.

* * * * * * *

Amended Petition in Case No. 4185, with Exhibits Attached, omitted from the Printed Record, pursuant to Designations of Counsel as to Printing Record, copied at pages 1 and 5.

* * * * * * *

Answer to Amended Petition in Case No. 4185, omitted from the Printed Record, pusuant to Designations of Counsel as to Printing Record, copned at pages 1 and 5.

The Tax Court of the United States.

William O. Culbertson, Sr.,
vs
Commissioner of Internal Revenue, Respondent.

Gladys Culbertson,
vs
Commissioner of Internal Revenue, Respondent.

Docket Nos. 4184, 4185.

Benjamin L. Bird, Esq., and *Y. D. Harrison, Jr., Esq.*, for the petitioners.
J. Marvin Kelley, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

DISNEY, *Judge:* These cases, consolidated for hearing and disposition, involve deficiencies in income tax as follows:

Petitioner	Docket Number	Income Tax Deficiencies 1940	1941
William O. Culbertson	4184	$554.98	$9,164.34
Gladys Culbertson	4185	437.02	8,756.34

The issues to be determined are: (1) Was the business enterprise, W. O. Culbertson and Sons, operated as a partnership, for income tax purposes, composed of petitioner and his four sons? (2) In the alternative, if no valid partnership existed, were the petitioners taxable on one-half and each of the sons taxable on one-eighth of the income arising from the business enterprise of W. O.

Culbertson and Sons by virtue of their alleged ownership of the assets of the business?

From evidence both documentary and oral, we make the following:

FINDINGS OF FACT.

The petitioners, William O. Culbertson and his wife, Gladys Culbertson, reside at Dalhart, Dallam County, Texas. Their income tax returns for the years 1940 and 1941 were filed with the collector of internal revenue for the second collection district of Texas, at Dallas, Texas. Since the transactions involved in this proceeding pertain particularly to William O. Culbertson, the husband, he will hereafter be referred to as petitioner.

Five children, four sons and one daughter, were born to petitioner and his wife, all of whom are now living. They are W. O., Jr., Richard, Joe Jack, Eugene and Fannie. On January 1, 1940, at the beginning of the first taxable year here involved, they were 24, 22, 18, 16 and 14 years of age, respectively. Richard was married in the spring of 1940, and W. O., Jr., was married in December 1940.

From about 1915 to October 1939 petitioner and R. S. Coon were engaged in the cattle and ranching business as a partnership under the firm name of Coon and Culbertson. They bred and produced pure bred, registered Hereford cattle.

Since the Culbertson boys were about 12 years of age they have done odd jobs on the ranch during summer vacations and sometimes on week-ends, such as riding, looking after cattle, tatooing calves, taking care of breeding records, etc. W. O., Jr., finished high school in 1933 and worked on the ranch until the fall of 1934, when he

entered Texas A. & M. College, and took a course in animal husbandry. During the next four years he worked on the ranch between school terms, about three months each summer. He finished Texas A. & M. College in May 1938 and became foreman of the ranch for Coon and Culbertson, and continued in that capacity until the dissolution of that partnership in the fall of 1939. For his services as foreman he received $100 per month and board. During the time W. O., Jr., served as foreman for Coon and Culbertson, the only purchase he made for the organization was one bull, and he has made no purchases for the organization of W. O. Culbertson and Sons.

During the spring of 1939, due to the age and health of Mr. Coon, it was determined to liquidate the herd and dissolve the partnership. Coon and Culbertson while liquidating their business sold about 350 head of Bradfords (a cross between Brama and Hereford cattle) to the four Culbertson boys. Before the transaction was completed, a former customer of Coon and Culbertson, and a good friend of all parties, attempted to buy the Bradfords from R. S. Coon. At the suggestion of Coon the sale was changed from one of the Culbertson boys to the former customer, by an additional payment by him to the boys of about $5 per head profit. By October 1939, the herd had been reduced to approximately 1,500 registered cattle. About that time petitioner offered to purchase the remainder of the herd at a price "around $65 per head." Petitioner's offer was accepted by Mr. Coon, provided petitioner would sell his four sons an undivided one-half interest in the herd at the same price. Petitioner advised Coon that he would see the boys about the matter. Soon thereafter petitioner went to the ranch, which was at Beuyeros, New Mexico, 93 miles from Dalhart. There he saw W. O., Jr., and talked to him about the "deal." W. O., Jr., was enthusiastic about the matter. He later talked to Joe Mack and Eugene, and "they

thought it was mighty nice they could buy the cattle at the price." Richard was at Texas A. & M. College at that time. Petitioner offered to finance the purchase of the undivided one-half interest for the boys.

On November 4, 1939, Coon and Culbertson executed a bill of sale to petitioner covering the cattle then owned by that partnership, and petitioner gave his check to Coon and Culbertson in payment therefor in the amount of $99,440. Two days later, on November 6, 1939, petitioner and his wife, Gladys, executed a bill of sale to W. O., Jr., Richard, Joe Jack and Eugene covering an undivided one-half interest in the same cattle which petitioner had purchased on November 4. A bill of sale was handed to W. O., Jr., who gave it to the bookkeeper and "told him to file it." The next day the boys gave a note to the petitioner for $49,720, at 4 per cent interest, due one year from date, for the one-half undivided interest in the cattle described in the bill of sale.

The partnership of Coon and Culbertson owned some other properties, including a few head of cattle, grass leases, saddle horses and odds and ends, that were not conveyed to the petitioner or his sons in the foregoing transaction. A new note dated January 1, 1940, in the amount of $57,674.80, at 4 per cent interest, due one year from date, executed by the four sons and payable to petitioner and his wife, was given to them to cover the additional properties mentioned in this paragraph. Soon thereafter, however, Coon and Culbertson sold the additional cattle covered by the note of January 1, 1940, and that note was credited with $5,930. This credit, along with others appears on the back of the note, as follows:

Credit of January 1940 overcharge on original Note	$ 5,930.00
Balance due on Note	$51,744.80
Credit Dec. 30/1940 Gift as shown on WOC	

1940 Income report & Ledger account	4,000.00
Balance due on Note	47,744.80
Credit June 10th 41	30,000.00
Balance due on the above note as of June 10th 41	17,744.80
Credit	
June 10th 1941 Gift	17,744.80

Paid in Full as of June 10th 1941.

A local Dalhart paper, under date of December 2, 1939, quoting "Culbertson," announced the fact of the dissolution of the Coon and Culbertson partnership and that the business would be operated by Culbertson and his boys under the name of Culbertson and Sons. A bank account was opened in the name of W. O. Culbertson and Sons—upon which petitioner, his four sons and bookkeeper could check; however, most of the checks were signed by the bookkeeper, Mr. Williams. On November 13, 1939, the Coon and Culbertson membership in the American Hereford Association, at Kansas City—the Central United States Registry for all registered Hereford cattle—was changed to W. O. Culbertson and Sons and a certificate issued. Neither newspaper article nor stock certificate called Culbertson and Sons a partnership.

On December 31, 1940, petitioner inventoried the cattle involved herein at an average price of $60 per head.

After the formation of the organization, W. O. Culbertson and Sons, W. O., Jr., continued his work as foreman of the ranch under the same arrangements as previously existed under Coon and Culbertson.

W. H. Coon, (R. S. Coon's nephew, attorney-in-fact and manager of R. S. Coon's Panhandle interests) on or about

November 23, 1939, wrote to A. A. Wright, manager of the National Finance Credit Corporation, Fort Worth, Texas, in part as follows:

> Mr. W. O. Culbertson and Sons will take over the Coon & Culbertson herd November 1st, 1939. Mr. R. S. Coon is selling his interest in the cattle to this new firm—W. O. Culbertson and Sons.
>
> Mr. Culbertson would like to establish a credit with the National Finance Corporation and if this is agreeable with you we would like to have the herd inspected on the 29th of this month. We will tally the cattle over to Mr. Culbertson at the same time your representative inspects the cattle. * * *

Sometime after the date of the above letter petitioner talked to A. A. Wright about borrowing funds for W. O. Culbertson and Sons and explained that there were minors involved. Upon learning that two of the sons were minors, Wright advised petitioner to have prepared some kind of document whereby he could qualify authorizing him to sign for the minors. Following this advice petitioner called on his attorney and explained to him the "Partnership" in detail and instructed him to prepare a document whereby he could sign mortgages and borrow money, a document their (the finance Co.) attorney would accept. Pursuant thereto the attorney prepared a document which was read and understood by petitioner. In essential part it reads:

> Whereas, the undersigned, W. O. Culbertson and Gladys Culbertson, husband and wife, are the owners of certain live stock, land leases and ranch equipments and supplies, located in Harding County, New Mexico, and,

Desiring to make provisions for the welfare of our sons, W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, and desiring to establish them in business, as and when they arrive at a proper age to engage in business; and, further, desiring to induce our said sons after they reach such state of maturity, to contribute their time and services, in building up and establishing a common family estate, and desiring to suitably reward them for their assistance to us in so doing, and in order to establish with them a limited partnership in a ranching enterprise to be hereafter known as W. O. Culbertson & Sons;

Therefore, Know All Men By These Presents, That we, W. O. Culbertson and Gladys Culbertson, for and in consideration of the sum of Ten Dollars to us paid, and other good and valuable consideration considera-tion, [sic] do hereby and by these presents sell and convey unto W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, and to each, an undivided one-eighth interest, in and to the following described property, to-wit:

[Followed by a description of the property as in the bills of sale heretofore considered.]

This conveyance is made subject to the following conditions and stipulations, to-wit:

I. The grantors, W. O. Culbertson and Gladys Culbertson, reserve to themselves, the sole and exclusive right and control and management of such properties herein conveyed, with increases thereof, until the time that the youngest of our said sons living shall have arrived at the age of twenty-one years; including the

right of sale, or exchange of said property or any part thereof, and the right to purchase or lease lands for the use of the ranch enterprise, either out of earnings or of sales of property on hand; the right to purchase additional livestock; the right to borrow money on the credit of part or all of the property belonging to the ranch, and to pledge the property for security for such money so borrowed; the right to increase by purchase, or to diminish by sale, the livestock on said ranch; to sell any equipment or supplies now belonging to the ranch or to purchase other equipment and supplies; to invest the money derived from sales or from earnings of the ranch as they may deem proper; in fact, to manage and control the property herein conveyed, without restrictions and in such manner as may by them be deemed proper, until the youngest surviving son shall have arrived at the age of twenty-one years; and until such time, it shall not be necessary to obtain the verbal or written consent of either of said sons, or of any instrument in writing from either of said sons, to any transaction desired to be done in the premises, by the grantors herein.

2. It is specifically made a condition of this conveyance, that should there be at any time before the youngest surviving son shall have arrived at the age of twenty-one years, any losses sustained in the operation of such ranch, or other interprises [sic] involved, then the grantors, nor either of them, shall become personally liable to the grantees herein, or to either of them, for any part of such losses, but such losses, if any, shall be bourne [sic] by such ranch interprise, [sic] and not by any individual owner of any interest therein.

3. It is further made a condition of this conveyance, that neither of our said sons, shall have the right of withdrawal of any part of his interest in such ranch interprise, [sic] or the sale of same, until the youngest surviving son shall have reached the age of twenty-one years, but at such time either one, or all of such sons, shall have the right of withdrawal from such partnership, and shall be entitled to receive his interest therein, but his interest shall be equal to an undivided one-eight in value, or property in kind, after all liabilities, if any, of such ranch or other interprise [sic] has been liquidated.

4. In the event of the death of either of our said sons, prior to such time that the youngest surviving son shall have reached the age of twenty-one years, such deceased son leaving no surviving wife or child or children born in lawful wedlock, then such interest of such deceased son shall vest in his father and mother and surviving brothers and sisters, or the surviving [sic] ones, according to the rule of descent and distribution prevailing in Texas. In the event of the death of either of our said sons, before the youngest of our surviving sons shall have reached the age of twenty-one years, such deceased son leaving surviving him, a wife or child or children born in lawful wedlock, then such share of such deceased son shall go to and vest in such surviving wife and child or children born in lawful wedlock, according to the law of descent and distribution prevailing in Texas.

5. In the event of the death of grantor, Gladys Culbertson, prior to the time that our youngest surviving son reaches the age of twenty-one years, leaving surviving her, grantor W. O. Culbertson, then the exclusive control and management of said properties, as

provided in paragraph No. 1 hereof, shall vest in said W. O. Culbertson along. In the event of the death of said W. O. Culbertson, prior to the time the youngest surviving son shall have reached the age of twenty-one years, and said Gladys Culbertson then still being alive, the joint management of said properties, as provided in said paragraph I. herein, shall vest in said Gladys Culbertson and the oldest surviving son. In the event of the death of both W. O. Culbertson and Gladys Culbertson before the surviving youngest son shall reach the rge of twenty-one years, then the right of management and control, as provided in paragraph No. I. hereof, shall vest in the two oldest surviving sons.

* * * * * * *

In Testimony Whereof, witness our hand, at Dalhart, Texas, this the 8th day of December, A. D. 1939, but to become effective on the 1st day of January, A. D. 1940.

After which followed petitioner's and his wife's signatures and a notary public's affidavit to the effect that the instrument was executed "for the purpose and consideration therein expressed."

The foregoing document was executed by petitioner without inquiring of his four sons as to whether they would agree to it. W. O., J., was not advised of the document until sometime after May 1943.

Later, during 1940, petitioner and his wife, Gladys, executed a document concerning their daughter, Fannie. The document reads, in part, as follows:

WHEREAS, on the 8th day of December, 1939, W. O. Culbertson, and wife, Gladys Culbertson, executed a certain trust instrument, by the terms of which a

limited partnership was created between themselves and their sons, W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, and by the terms of which a conditional conveyance was made to each of said sons of an undivided one-eighth interest in and to certain properties described in said trust instrument; and the Grantors therein retained to themselves an undivided one-half interest in and to the property so described, a true copy of such trust instrument in so far as necessary to reflect the tenor and effect of this conveyance now about to be executed by the said W. O. Culbertson and Gladys Culbertson, and;

Whereas, said trust instrument, and the partnership thereby created, is now in full force and effect, and;

Whereas, the said W. O. Culbertson and wife, Gladys Culbertson, now desire to make conveyance to their minor daughter, Fannie Culbertson, a like conveyance of an interest in such partnership, equal to the interest conveyed to each of said sons;

Now, Therefore, we, W. O. Culbertson and wife, Gladys Culbertson, for an [sic] consideration of the sum of Ten Dollars ($10.00) paid, and for other good and valuable consideration, do hereby and by these presents grant, sell and convey unto the said Fannie Culbertson an undivided one-eighth interest in and to all the property now owned and held by the co-partnership of W. O. Culbertson and Sons, wherever such property may be now located, and being an undivided one-fourth part of the partnership interests now owned and held by said W. O. Culbertson and Gladys Culbertson, but this conveyance of such interests is made subject to all the terms and conditions of the said trust instrument, dated 8th day of December, 1939, a copy of which being hereto attached and made a part hereof.

In Testimony Whereof, witness our hand at Dalhart, Texas, this 31st day of December, 1940.

The document was signed and executed before a notary public in a similar manner to the aforementioned document.

At about the same time Fannie gave a note to petitioner in the amount of $13,488.27 covering the purchase of the above-mentioned one-eighth interest. The note was satisfied by a credit of the full amount through a gift to her from petitioner.

On or before June 10, 1941, W. O. Culbertson and Sons borrowed $60,000 from the National Finance Credit Corporation which was "turned over" to petitioner. Half of the amount represented the credit of $30,000 appearing on the back of the note given by the boys to petitioner and his wife, dated January 1, 1940. The boys did not sign anything in connection with this loan. It was handled by petitioner. The loan was repaid with proceeds from the ranch.

A partnership return of income for W. O. Culbertson and Sons for the year 1940 was filed with the collector of internal revenue on March 10, 1941. The return was sworn to by the petitioner. In the return it is stated that the partnership was organized on January 1, 1940. Attached to the return are certain schedules which were prepared on letterheads of W. O. Culbertson and Sons. In the upper left hand corner appears the name of W. O. Culbertson, while in the upper right hand corner appears the names of the four sons. The return contained the following information in Schedule "J":

1. Name and address of each partner * * *.	2. Ordinary net income * * *.
W. O. Culbertson, Dalhart, Texas.....	$8,901.09
W. O. Culbertson, Jr., Bueyeros, N. Mex.	3,425.28

Richard R. Culbertson, Dalhart, Tex.	2,287.28
Joe Jack Culbertson, Dalhart, Texas	2,225.28
Eugene Culbertson, Dalhart, Texas	2,225.28
Totals	$19,064.21

The return also contained the following information, on page 1:

Gross receipts from business or profession—$29,237 17; merchandise bought for sale—$4,665.55.

A similar return was filed for W. O. Culbertson and Sons for the year 1941. In that return were certain schedules prepared on letterheads of W. O. Culbertson and Sons. In the upper right hand corner thereof were the names of the petitioner, his wife, Gladys Culbertson, and their five children. Directly underneath was the statement: "All equal owners in W. O. Culbertson and Sons." The return contained the following information in schedule "J":

1. Name and address of each partner * * *.	2. Ordinary net income * * *.
Miss Fannie Culbertson	$ 7,825.17
Richard R. Culbertson	7,825.17
Joe Jack Culbertson	7,825.17
Eugene Culbertson	7,825.17
W. O. Culbertson, Jr.	9,025.17
W. O. Culbertson, Sr.	23,475.48
Totals	$63,801.33

The return also contained the following information on page 1: Gross receipts from business or profession—$198,-884.85; merchandise bought for sale—$172,829.02. It was stated on page 4 that the partnership was organized on January 1, 1941.

On a letterhead used by W. O. Culbertson and Sons in April 1946 there appears in the upper right hand corner thereof the names of W. O. Culbertson, Sr., and Gladys Culbertson and the five Culbertson children. Directly underneath the names is this statement: "All one-sixth owners in W. O. Culbertson and Sons."

Richard, Joe Jack and Eugene finished high school. Richard finished Texas A. & M. College in May 1940 and went directly into the Army. Joe Jack attended Texas A. & M. College but before graduation "he had to drop out due to the war." At the time of the hearing of this case, he had gone back to finish the last term. Eugene, at the time of the hearing of this case, was attending a business college at Amarillo.

W. O., Jr., is the only son who was rendering any kind of services or taking any part in the ranch operations at the time of this hearing. Fannie helps operate a dry goods store in Dalhart, Texas, which is operated "in conjunction with out cattle business." No accounts for the store are set up on the books of W. O. Culbertson and Sons.

Richard, Joe Jack and Eugene were paid wages for their services during the summer months.

During the taxable years petitioner looked after the office in Dalhart. There he contacted buyers, handled contracts, made purchases and sales of cattle, and looked after the "borrowing of money" and the general business of the office. Petitioner was at the ranch frequently during the taxable years, an average of a little more than once each month. Petitioner did not receive any salary for his services.

The book for the organization W. O. Culbertson and Sons were set up October or November 1939. There are no accounts set up in the books showing alleged partnership.

Sometime in 1943, after a revenue agent had questioned the validity of the partnership of W. O. Culbertson and

Sons, petitioner went to Fort Worth and discussed the matter with the manager of the National Finance Credit Corporation, who suggested he contact an accountant. The accountant was employed in the matter by petitioner and he advised petitioner to institute court proceedings to determine whether the partnership was valid. Sometime after May 1943 petitioner wrote a letter to W. O., Jr., advising him, for the first time, about the existence of the document dated December 8, 1939, and it was decided to institute proceedings in the District Court of Dallam County concerning the validity of the partnership and the document executed by petitioner and his wife on December 8, 1939. Petitioner employed an attorney. A petition was filed in the name of the five children of petitioner on February 23, 1944, and on February 26, 1944, the petitioner and his wife, who were named as defendants, filed their answer. The petitioner was the only person present at the hearing except his attorney and the court officials. The petitioner there testified, in part: "I followed Mr. Wright's request, to get something in the form of a partnership so he could carry me, so he could carry my finances with him"; also that the document of December 8 was executed following Mr. Wright's suggestion. Upon the evidence submitted, the court entered its decree that the document of December 8, 1939, was void and that the partnership was in all things valid.

The essentials of fine Hereford breeding involves three phases. One is feed and care and an understanding of type of feed, for certain ages and classes of animals. Constant care is required, and it is essential to have proper brood blood lines; also to maintain those lines and to understand outcrops and the types of breeding desired.

OPINION.

The questions presented to us here are whether the business organization of W. O. Culbertson and Sons constitutes a partnership for Federal income tax purposes, or, in the alternative, whether the income from the business should be taxed in accordance with the alleged ownership of the assets of the business.

The respondent denies both the principal and the alternative contentions.

In support of his first contention petitioner argues that "This is not a cause where a father has control of a business prior to the creation of a partnership with relatives, and the same control and dominion after the partnership was created"; further, that "The only way that any of the Culbertsons acquired Coon's one-half [interest] was by virtue of the formation of this partnership." He claims that three things are clear, and upon these he primarily bases his case. They are:

> (1) The Culbertson boys really acquired their one-half interest from R. S. Coon.
>
> (2) R. S. Coon, and not petitioner, originated the conveyance of an undivided one-half interest in the cattle to the Culbertson boys and the formation of W. O. Culbertson and Sons.
>
> (3) An indeterminate part of the value of the cattle the boys contributed to W. O. Culbertson and Sons originated with them in the first instance—the difference between the actual value and the sales price of the cattle included in the bills of sale—for the boys were quite clearly third party beneficiaries of the Coon-petitioner contract.

Respondent, on the other hand, argues that the case is to be decided by the principles announced in *Commissioner v. Tower*, 327 U. S. 280, *and Lasthaus v. Commissioner*, 327 U. S. 293. He contends that the sons have not met any of the requirements announced therein. The portion alluded to in the *Tower* case is as follows:

> There can be no question that a wife and a husband under certain circumstances, become partners for tax, as for other, purposes. If she either invests capital originating with her or substantially contributes to the control and management of the business or otherwise performs vital additional services, or does all of these things she may be a partner as contemplated by 26 U. S. C. §§ 181, 182. The Tax Court has recognized that under such circumstances the income belongs to the wife. A wife may become a general or a limited partner with her husband. But when she does not share in the management and control of the business, contributes no vital additional service, and where the husband purports in some way to have given her a partnership interest, the Tax Court may properly take these circumstances into consideration in determining whether the partnership is real within the meaning of the Federal revenue laws.

Our first consideration is to examine the business transactions to determine whether, within the language of the *Tower* case, the Culbertson boys actually invested any capital in the alleged partnership. In this respect petitioner argues that the boys did, in fact, buy their interest from Coon. With this theory we can not agree. W. O. Culbertson testified that he told Wright that Coon sold to W. O. Culbertson and Sons—not to the boys, and Coon's nephew, writing to Wright about November 23, said Coon was selling to W. O. Culbertson and Sons. Ac-

cording to the evidence placed before us there was a definite sale and bill of sale from the partnership of Coon and Culbertson to petitioner covering the assets that later formed the nucleus of the business known as W. O. Culbertson and Sons. At a later date, a bill of sale indicated a sale of half that interest to the boys and the boys gave to petitioner and his wife a note that called for payment within one year. Thus it is seen that in fact the boys did secure their interests from their father. However, even if as urged by the petitioner we consider the father a conduit between the boys and R. S. Coon in the purchase of the cattle, the result here is, in our view, not different. If the father did not furnish the cattle themselves, he furnished the money to obtain them, paying Coon for them, conveying them to the sons as to a half interest, and taking his sons' notes. (The fact that R. S. Coon inquired about the boys' finances and, though it is not shown, might have financed them, is immaterial. He did not do so, and their father did.) The sons furnished no capital at that time, and were put into the alleged partnership with their father's contribution. This taken with the later facts that to the extent of about $21,000 their notes were given back to them, and the business itself, not they, paid off the other $30,000, makes it clear that the sons made no capital contribution, within the sense of the *Tower* case. There is no essential difference, under all the facts here, between a gift of a capital contribution by a father or husband in the beginning, and the gift of it later when the father forgives the notes, particularly in the light of the father's testimony, relative to whether he felt the boys would be able to pay in the one year specified in the note. "I never—I didn't give it too much thought." We think he did not expect or intend them to pay it. Morever, the conveyance of the cattle, without other consideration than the notes, later forgiven, except as paid by the business, is seen as so completely a part of

the formation of the alleged partnership as to constitute an incompleted gift, as considered in the *Tower* case, so as to place in the hands of the sons no capital contributable by them to the partnership.

The gifts made by petitioner are within the language of the *Tower* case and therefore do not establish a basis for capital contribution sufficient to establish an interest in the alleged partnership. Neither does the payment of the $30,000 out of the proceeds of the business come within the language of "capital originating with her [the alleged partner]." The *Lasthaus* case is in point here, in that in that case there was a series of notes signed and payment made out of the business, but it was not sufficient to establish a basis for invested capital.

We can ascribe no weight to the petitioner's contention that an indeterminate part of the value of the capital—difference between actual value and price paid—came from Coon to the sons and was contributed by the partnership to them in the light of the evidence that the father inventoried the cattle, as of December 31, 1940, at $60 a head, whereas the purchase price was about $65 a head. There is nothing in the record convincing that the purchaser was really getting the cattle at a bargain price, and even if there was, nothing from which we could soundly regard the bargain as a gift from Coon to the boys.

We consider next whether the sons contributed such services as, under the *Tower* case and others to the same effect, would justify recognition of a partnership. As to the three younger sons, it is clear, we think, that there was no such service contribution. Though we have no doubt that the boys assisted in a laudable filial spirit on the ranch, we discern nothing constituting what we think is a requisite contribution to a real partnership. They appear to have done no more after the alleged partnership than before. W. C., Jr., is in a different position in

that he was older and was earning a salary as foreman of the ranch, but that fact only serves to refute a contribution of such service by him as would support a partnership. He was paid both before and after formation of the alleged partnership, at about the same rate for about the same services. We see none contributed to the partnership. We think in general that services do not greatly affect this case. We find no son adding "vital additional service" which would take the place of capital contributed because of formation of a partnership.

In addition to the above inquiry as to the presence of those elements deemed by the *Tower* case essential to partnerships recognizable for Federal tax purposes, other facts in our opinion compel a conclusion that there is not here presented such partnership. Looking at all of the facts, we can not give to the bill of sale made to the boys on November 4, the weight urged by the petitioner, as against the document of December 8. Though urged by the petitioner, as against the document of December 8. Though W. O., Jr., at least did not know of the latter document for a long time (nothing definite indicates whether the other boys did or not), we can not regard that fact so important as urged. The father, asked about his failure to disclose that document, testified that "I didn't think they'd be concerned in it," also that he didn't think so," when asked if he did not think the boys would be interested in knowing about the line of credit to establish which he said he drew up the document of December 8. We think that is right—that this was a family matter (requiring close scrutiny), so managed by the father that the sons were not concerned as to the form it took, or in the way their father handled it, for they would be treated right by their parents. This is indicated, we think, by the two other cattle deals in which the sons were interested—as to the Brafords where their purchase was, in effect, disregarded, when another

wanted to buy what they had bought, and as to the extra cattle which were taken over about January 1, 1940, but were later sold by *Coon and Culbertson*, not by Culbertson and Sons. These purchases by the sons were just as real, it seems to us, as that of the herd on November 4, yet the sons at least permitted their elders to dispose of the Brafords and the extra cattle. Though the publicity given to "Culbertson and Sons" by newspaper and the change of the American Hereford Association stock to Culbertson and Sons do indicate that in November the boys were considered in connection with the cattle business, the whole record before us fails to convince that there was a partnership from that time, in the face of the instrument of December 8 by the father and mother. Neither the newspaper article nor the stock certificate in American Hereford Association calls Culbertson and Sons a partnership. The newspaper article referred to "Culbertson and Sons, the name under which Culbertson and his sons will operate"—Quoting Culbertson. The instrument of December 8, 1939, if here given effect, precludes the idea of a partnership and is not relied upon by the petitioner here, but was, at his instance, set aside by a local court. [The decree is clearly collusive and without effect here. *Freuler v. Helvering*, 291 U. S. 35; *Francis Doll*, 2 T. C. 276; affd., 149 Fed. (2d) 239; cert. denied 326 U. S. 725; *Eric Krag*, 8 T. C. ..... (No. 123, promulgated May 16, 1947).] Though urged, in effect, that it can not stand against the bill of sale of November 4, we think the reasons given are insufficient, and that it should be here given effect. The question of fact here is: When and by what instrument or agreement was the association between parents and sons in the cattle business effected? The petitioner says the bill of sale of November 4 was the basis for an oral agreement of partnership about that time. Yet, he solemnly represented to the finance company that on December 8 he and wife were the owners

of the same cattle described in the bill of sale, and that he was then making a conditional conveyance to them, and therein he retained, *inter alia*, such broad powers as to preclude consideration of the status created as partnership. We can not believe, as contended in effect, that the finance company knowing of the bill of sale to the sons, nevertheless lent large sums of money without the sons' signatures. Had the finance company's attorney been apprised of the bill of sale, it is inconceivable that he would have approved loans on the cattle without the signatures of the sons. If the bill of sale were considered effective, no one but the sons could authorize the father to borrow on the cattle. He could not himself give himself authority. From this we believe not only that the finance company was not informed of any transfer of cattle to the boys (though informed in general of a "partnership," there is no evidence that Wright was then told of the bill of sale, but also that the father, in executing the instrument of December 8, did not consider the bill of sale effective. We do not think he intentionally misrepresented to the finance company that he was the owner, but that he, with good reason, considered himself such, and considered, as did the finance company, that the effective transfer was that of December 8. His testimony before the Texas court was that Wright required the partnership agreement to be reduced to writing. We think they both considered the "partnership" was formed December 8. This is in accord with the income tax return for 1940, stating that the partnership started on January 1, 1940—as the document of December 8 had provided. Also, the letterhead used in making up the return for 1941 including Fannie Culbertson as one of the "equal owners" in W. O. Culbertson and Sons, indicates to us that the father was dividing up the family holdings at his will. Such action is not consistent on the record before us, with rights vested in the boys, or so considered

by them. Moreover, the bill of sale to the boys, if of any effect, was, in our view, a gift, similar to gifts of "partnership" capital in various cases. It does not, moreover, prove a partnership. The partnership relied upon must rely, under the petitioner's theory that it originated about November 4, on mere oral conversations, not shown to have been participated in by all parties concerned. We think that, as required by the finance company, this "partnership" was put in writing later—on December 8, but subject to such conditions that it does not constitute such for Federal income tax purposes. That instrument recognized expressly that provision was to be made for the boys to establish them in business "as and when they arrive at a proper age to engage in business"—and to induce them "after they reach such state of maturity to contribute their time and services." This is in sharp contrast with the present contention of a then pre-existing partnership. We are not impressed with the idea that W. O. Culbertson did not intend the language of that instrument. He intended to borrow money by means of it. It was read to him and he understood it. We think it represented the facts.

We also think it is important that W. O. Culbertson and Sons did not carry capital accounts for the alleged partners on the books, and that the amounts of any withdrawals or financial participation by the sons are not shown to any appreciable extent. In this respect the instruments, signed by petitioner and his wife, dated December 8, 1939, and December 31, 1940, take an added significance. By these instruments it appears that the boys (and daughter) are to acquire an interest in the business *in the* future, and we can not pass them off lightly, as does petitioner on brief. Moreover, the fact that at the time of trial the boys were not, with the exception of W. O., Jr., (and perhaps Richard—"Richard has some lately"), taking part in the operation of the ranch, is hardly con-

sistent with the petitioner's contention or the idea that Coon thought Culbertson could operate the business.

Though the petitioner urges that many cattle businesses are composed of fathers and sons, and that the nature of the industry so requires, we think the same is probably equally true of other industries where men wish to take children into business with them. Nevertheless, we think that fact does not override the many decisions to the general effect that partners must contribute capital originating with them, or vital services. See *Scherf v. Commissioner*, ... Fed. (2d) ... (May 16, 1947), where it is held that (though adult) "neither of the sons furnished or expected to furnish to the business any new capital or skill, or any new or substantial service"—a statement very applicable here, to a different industry and facts. Again, applying a statement from *Wilson v. Commissioner*, ... Fed. (2d) .... (May 1, 1947), we think here "The conduct, control and management of the partnership business went on just as it did before the transfer." The father continued very largely to manage the finances, sales and purchases, W. O., Jr., continued to work on a salary as before, and the other boys contributed nothing of substance to the business.

Considering the treatment accorded the alleged partnership claimed formed on November 4, 1939, by the father, the fact of family relationship, and the borrowing of funds upon the later instrument, and all of the facts before us, we are of the opinion and hold that the alleged oral partnership did not constitute the parties partners for Federal income tax purposes.

Petitioner argues in the alternative that if the partnership of W. O. Culbertson and Sons is not recognized for tax purposes, the income from the cattle should be taxed to the owners thereof according to their interest. In support of his argument, he relies on *Francis A. Parker*,

6 T. C. 979; *Felix Zukaitis*, 3 T. C. 814; *Estate of Frank G. Ennis, Sr.*, 5 T. C. 1103; *Montgomery v. Thomas*, (C. C. A. 5) 146 Fed. (2d) 76. It is true that each of these cases holds that the income was to be taxed in proportion to the ownership in the different organizations, but in each case it was first decided that there was a bona fide partnership and only because of that fact was the income taxed to the respective partners. The above cases involve income from a business. *Warren MacPherson*, 19 B. T. A. 651, also cited, does not, in our opinion, support petitioner's view, for therein we think it clear there was partnership for Federal tax purposes. Another case relied on by petitioner is *Allen, Collector v. Beazley*, (C. C. A. 5) 157 Fed. (2d) 970, involving income from the holding of securities. In the *Beazley* case, the securities were taken in the name of the taxpayer only, and it was contended that the income therefrom was taxable equally between the family members because of their respective ownership in the securities. This case is distinguishable from the instant case in that it is based on its particular facts, that of holding property (securities) and distributing the income to the owners thereof, while the instant case is one which deals with the distributing of income of a business. There has been no showing in the instant case that the income is the result of mere holding the cattle (or property) but rather it appears that the ranching business involves a much more involved process than that in the *Beazley* case.

We have considered this identical question in such cases as *Albert Nelson*, 6 T. C. 764, and *Robert E. Werner*, 7 T. C. 39. The following language appears in the latter case:

> In the instant case, we think it is sufficiently clear that petitioner's wife merely held a bare legal title to Tri-State's tangible assets. We think it is equally

clear that the income involved was not derived from mere ownership. Wilma Werner, though the title holder, did not engage in the business which created the income. * * *

We follow the *Nelson* and *Werner* cases as to this point as it is our view that the income was created by the use of the assets of the business in connection with the ability and organization of petitioner. The bare legal title to the assets is not the essential element in the production of the income. The evidence before us of the necessity for business management and care in the raising of fine Hereford cattle will not permit a conclusion that income is derived merely from ownership of the cattle. "Constant care" was required, "proper brood blood lines" are necessary, and understanding of "outcrops and the types of breeding" are essential. Mere ownership will not work such results.

As to the partnership question, we therefore hold for the respondent. Under stipulation, credit for two dependents is to be allowed the petitioner.

Decision will be entered under Rule 50.

(Seal)

Enter: Entered Jun. 24, 1947.

97 DECISION.

The Tax Court of the United States,
Washington.

(Seal)

William O. Culbertson, Sr., Petitioner,
v. Docket No. 4184
Commissioner of Internal Revenue, Respondent.

Pursuant to the Memorandum Findings of Fact and Opinion of the Court, entered June 24, 1947, the respondent on July 23, 1947, filed a computation of tax, and on July 28, 1947, the petitioner filed a computation in agreement with that of respondent. In accordance therewith, it is

Ordered and Decided: That there are deficiencies in income taxes for the calendar years 1940 and 1941 in the respective amounts of $429.58 and $8,756.34.

Enter: Entered Aug. 6, 1947.

(Signed) JOHN W. KERN,
(Seal) Judge.

98 DECISION.

The Tax Court of the United States,
Washington.

(Seal)

Gladys Culbertson, Petitioner,
v. Docket No. 4185.
Commissioner of Internal Revenue, Respondent.

Pursuant to the Memorandum Findings of Fact and Opinion of the Court, entered June 24, 1947, the respondent on July 23, 1947, filed a computation of tax, and on July 28, 1947, the petitioner filed a computation in agreement with that of respondent. In accordance therewith, it is

Ordered And Decided: That there are deficiencies in income taxes for the calendar years 1940 and 1941 in the respective amounts of $429.58 and $8,756.34.

Enter: Entered Aug. 6, 1947.
(Signed) JOHN W. KERN,
(Seal) Judge.

STIPULATION FOR CONSOLIDATION ON PETITION FOR REVIEW.

99 Filed Oct. 16, 1947.

William O. Culbertson, Sr., Petitioner,
vs. Docket No. 4184.
Commissioner of Internal Revenue, Respondent.

Gladys O. Culbertson, Petitioner,
vs. Docket No. 4185.
Commissioner of Internal Revenue, Respondent.

The above named petitioners and the respondent, each acting by and through their respective attorneys of record, hereby stipulate and agree, as follows:

The above styled and numbered causes shall be, and they are hereby, consolidated for the purposes of a review by the United States Circuit Court of Appeals for the Fifth Circuit of the decisions heretofore entered by the Tax Court of the United States in said causes, said review being taken at the instance of the petitioners. In all of the proceedings which the petitioners may take to obtain a review of said decisions, they may proceed as if there were only one cause and join said causes in one petition for review, and present to the United States Circuit Court of Appeals for the Fifth Circuit only one petition for review, and only one record, which record shall embrace all of the pertinent proceedings had in said consolidated causes.

This agreement and stipulation is entered into because said causes were consolidated for hearing and decision before the Tax Court of the United States and because said petitioners are husband and wife, residing in Texas,

and because said causes involve the same transactions and the same evidence and the proceedings in one of said causes is equally applicable to and pertinent to the other, and because said causes were disposed of by the Tax Court of the United States in one opinion.

Executed on behalf of the above named parties by their attorneys of record, this 15th day of October, 1947.

BENJAMIN L. BIRD,
(Benjamin L. Bird)
Y. D. HARRISON, JR.,
(Y. D. Harrison, Jr.)
Attorneys for Petitioners.

909-913 Sinclair Building,
Fort Worth 2, Texas.

CHARLES OLIPHANT, C.A.R.
(Charles Oliphant)
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Washington, D. C.

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

Received Oct. 13, 1947.

Filed Oct. 13, 1947.

In the Tax Court of the United States.

William O. Culbe .son, Sr., Petitioner,
vs. Docket No. 4184.
Commissioner of Internal Revenue, Respondent.

Gladys Culbertson, Petitioner,
vs. Docket No. 4185.
Commissioner of Internal Revenue, Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now W. O. Culbertson, Sr. and Gladys Culbertson, by their attorney of record, and respectfully show:

I.

Jurisdiction.

W. O. Culbertson, Sr. and Gladys Culbertson are individuals, and husband and wife, residing at Dalhart, Texas. Their Federal income tax returns for 1940 and 1941 were filed with the Collector of Internal Revenue for the Second Collection District of Texas at Dallas, Texas. The place of residence of each petitioner and the office of said Collector were, and are, within the territorial jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit. The respondent on review is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States.

The Court in which the review of these causes is sought is the United States Circuit Court of Appeals for the Fifth Circuit.

Petitioners file this petition pursuant to the provisions of Section 1141 and 1142 of the Internal Revenue Code and Section 1009 of the Administrative Procedure Act (5 U. S. C. A. Section 1009).

II.

Prior Proceedings.

On December 17, 1943, the Commissioner of Internal Revenue determined a deficiency in Federal income tax against the petitioner, William O. Culbertson, Sr., for the calendar years 1940 and 1941 in the respective amounts of $554.98 and $9,164.34, and against the petitioner, Gladys Culbertson, for the same years in the respective amounts of $437.02 and $8,756.34, and sent by Registered mail a deficiency notice to each of said petitioners in accordance with the applicable provisions of the Internal Revenue Code. Thereafter, each petitioner on review duly and timely filed with the Tax Court of the United States, an appeal from the said determination of the Commissioner of Internal Revenue, contesting the amount of the deficiencies so determined by said Commissioner of Internal Revenue; thereafter, pursuant to leave, said petitioners amended their petitions before the Tax Court of the United States and the Commissioner duly filed his amended answer to said amended petitions in due course. The cases were then consolidated for hearing and tried by the Tax Court of the United States on November 13, 1946, before the Honorable Richard R. Disney at Dallas, Texas, upon the testimony of witnesses and certain Exhibits On June 24, 1947, the Tax Court of the United States,

promulgated its memorandum Findings of Fact and Opinion in the proceedings, pursuant to which decision was entered on August 6, 1947 that the petitioners on review were due deficiencies in income tax for the said years as follows: W. O. Culbertson, Sr., $429.58 and $8,756.34, Gladys Culbertson, $429.58 and $8,756.34.

III.

Nature of Controversy.

In 1902, R. S. Coon began the breeding of pure blood Hereford cattle and it remained one of the engrossing interests of his life thereafter; in 1915, Coon and W. O. Culbertson, Sr. (hereinafter called petitioner) formed the partnership of Coon and Culbertson to carry on a cattle business devoted to the breeding of an outstanding type of registered Hereford. The four sons of petitioner and his wife—W. O., Jr., Richard R., Joe Jack and Eugene Culbertson, who were respectively 24, 22, 18 and 16 years of age on January 1, 1940—grew up on the Coon-Culbertson ranch and all began to do ranching work at around 12 years of age—riding the range, moving and caring for cattle, tattooing, branding, keeping breeding records, participating in round-ups and working as regular cowboys. From the time each was approximately 12 years of age until each went into the Army, his time was devoted to going to school and working on the ranch.

R. S. Coon, who was childless, took a great interest in the Culbertson boys, loaning W. O., Jr. and Richard money to go through Texas A. & M. College, and otherwise evidencing a great interest in their development.

In early 1939, R. S. Coon, because of his age and health, was forced to retire from business activities and Coon and

Culbertson began liquidating the partnership cattle; the partnership cattle were sold down to the foundation brood herd by October, 1939, at which time petitioner offered to purchase Coon's one-half interest in the foundation herd at the general average prices which the partnership had received for cattle theretofore liquidated. R. S. Coon, being very much concerned with the perpetuation by selective breeding of the strain of Herefords which Coon and Culbertson had developed, and considering petitioner too old to accomplish that objective, advised petitioner that he would accept petitioner's offer on the condition that petitioner would in turn sell the Coon one-half interest to the Culbertson boys at the prices petitioner was paying therefor and allow the Culbertson boys to step in Coon's shoes in the partnership. Petitioner discussed this counter-offer with his sons, who agreed to purchase the same. Petitioner offered to and did finance the purchase for his sons, although a day or so later R. S. Coon proposed to W. O. Culbertson, Jr. that he be allowed to finance the purchase. At the suggestion of Coon's nephew and Panhandle agent, Coon and Culbertson executed a bill of sale covering all of the partnership cattle to petitioner on November 4, 1939, and on November 6, 1939, petitioner executed and delivered to the four Culbertson boys a bill of sale to an undivided one-half interest in the cattle, and the four boys executed and delivered to petitioner their joint note in an amount covering the price agreed upon by Coon and petitioner for the half interest, due one year from date with four percent (4%) interest; this sale to the Culbertson boys was not a gift of any sort and the boys understood that the note would have to be repaid. Petitioner and the Culbertson boys, at that time, entered into an oral partnership whereby each contributed his interest in the cattle to the partnership and profits and loss were to be divided accordingly; the name agreed upon was W. O. Culbertson and Sons. This part-

nership was widely publicized, the American Hereford Association issued its certificate to W. O. Culbertson and Sons on November 13, 1939, partnership books were set up as of November 1, 1939, letterheads were prepared, and a bank account opened.

Admittedly, none of the negotiations were motivated by tax considerations nor was the suggestion of taxes mentioned in any way in any of the activities ending in the creation of the partnership. In late November, 1939, petitioner, who had agreed in the formation of the partnership to handle partnership loans, discussed with A. A. Wright, the Manager of National Finance Credit Corporation, a cattle loan company, establishing a line of credit for W. O. Culbertson and Sons; Wright, upon being advised that two of the partners wer minors, suggested that Culbertson get a lawyer to draw up some paper which would authorize petitioner to borrow money and pledge the cattle; petitioner interviewed a Dalhart lawyer and told him of Wright's suggestion, and the lawyer, on his own initiative, drew up a document which petitioners executed on December 8, 1939. This document mentioned the words "limited partrnership" but in reality, purported to be a conveyance from petitioners to the four sons of an undivided one-half interest in the cattle but providing that the petitioners were to have the management of the cattle until the youngest son became 21 years of age. None of the Culbertson boys knew of the existence of this document until the present tax controversy arose in 1943; petitioner considered it merely as a means whereby he would carry out his agreement with the other partners to handle the partnership loans. During 1940 and 1941, up until he entered the Army, W. O. Jr. operated the ranch and the remaining sons worked on the ranch while not attending college or high school; petitioner handled loans, sales and purchases, as agreed. The partner-

ship, out of the Culbertson boys' share, paid petitioner approximately $30,000.00 of the purchase price of the Coon one-half interest and petitioner, as gifts to the boys, canceled the remaining $21,000.00 of their note.

The Commissioner of Internal Revenue, in the aforesaid deficiency notice, held that the partnership of W. O. Culbertson and Sons was not real or recognizable for Federal income tax purposes and taxed all of the partnership net income for the years in question to the petitioner and his wife.

The Board of Tax Appeals upheld this determination and the correctness of this determination is the primary question at issue in this review.

IV.

Assignments of Error.

The Tax Court erred—

1. In holding and deciding that W. O. Culbertson and Sons was not in reality a partnership for income tax purposes, as well as otherwise;

2. In holding and deciding that the Culbertson boys did not contribute to the partnership capital originating with them;

3. In holding and deciding that the Culbertson boys did not contribute valuable services to the partnership;

4. In failing to hold and decide that the document of December 8, 1939 was void and without force or effect in this proceeding;

5. In holding and deciding that the partnership was created by the document of December 8, 1939 rather than by the oral agreement of the partners effected at the time the Culbertson boys purchased the one-half interest in the cattle;

6. In holding and deciding that the 1940 and 1941 income from the cattle should not be taxed to petitioners and the Culbertson boys, the undisputed owners of such cattle, according to their individual interests in the cattle producing such income;

7. In that its opinion and decision are contrary to the uncontroverted evidence in this proceeding;

8. In that its opinion and decision in this proceeding are contrary to law.

Wherefore, petitioners petition that the decision of the Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that a transcript of the record be prepared in accordance with law and the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

BENJAMIN L. BIRD,
(Benjamin L. Bird)
Attorney for Petitioner.

Of Counsel:
WEEKS, BIRD, CANNON & APPLEMAN.

909-913 Sinclair Building,
Fort Worth 2, Texas.

Dated this 13th day of October, 1947.

BENJAMIN L. BIRD,
(Benjamin L. Bird)
Attorney for Petitioners on Review.

909-913 Sinclair Building,
Fort Worth 2, Texas.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error, mentioned therein is hereby acknowledged this 13th day of October, 1947.

CHARLES OLIPHANT, OWL
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

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111 STATEMENT OF THE EVIDENCE.

Lodged Nov. 21, 1947.

Filed Dec. 22, 1947.

In the United States Circuit Court of Appeals for the Fifth Circuit.

W. O. Culbertson, Sr., Petitioner on Review,
vs. Docket No. 4184.
George J. Schoenemin, Commissioner of Internal Revenue, Respondent on Review.

Gladys Culbertson, Petitioner on Review,
vs. Docket No. 4185.
George J. Schoenemin, Commissioner of Interal Revenue, Respondent on Review.

The following is a statement in narrative form of the evidence in the above styled cause. The proceeedings

came on for hearing on November 12, 1946, before the Honorable Richard L. Disney, Judge of the Tax Court of the United States, at Dallas, Texas. Benjamin L. Bird, Esquire and Y. D. Harrison, Jr., Esquire appeared on behalf of the taxpayers and J. Marvin Kelley, Esquire appeared on behalf of the Commissioner of Internal Revenue.

On motion of attorney for the petitioners, the two causes were consolidated for the hearing.

After opening statements by counsel for the respective parties the following testimony was offered and received in evidence:

WALTER WILLIAMS, being first duly sworn, testified as a witness on behalf of the taxpayers, as follows:

112 Direct Examination

My name is Walter Williams and I have been a cattleman, living in Houston, practically all of my life. I have known R. S. Coon, who was generally called Uncle Dick, for fifty years; Uncle Dick had different businesses, he owned real estate and cattle. He was a member of a cattle partnership called Coon and Culbertson which operated around Dalhart County in the Northern end of the Panhandle of Texas.

In 1939, Mr. Coon, who was around eighty and childless, determined to retire from business activities due to ill health and his age. He had been in the Coon and Culbertson partnership for over twenty years.

I frequently went around the country with Mr. Coon on account of his age and in October, 1939, I was with him in Dalhart where he was attending to the dissolution

before December 8, 1939, the date of the document about which I was cross-examined. The conversation occurred after October 23 and before December 8.

Examination by the Court.

In stating what my central idea, my main idea, in sugeting father and sons partnerships was, I will have to go back in my own experience. I was born and raised on the ranch and have been in the livestock business all my life. Through experience, I have learned that a man has to get a liking for the livestock business as a child; such has been my experience; as a consequence, where a man has a son and wants to make a ranch man out of him, we have encouraged him to go in partners with his son as an incentive to keep that son on the ranch.

Re-Direct Examination.

In this machine age, there has been a trend of young men leaving ranches and going to urban employment. My policy in recommending the formation of father and son partnerships was caused by the fact that a boy had to have some inducement or incentive to stay out on a ranch or farm. He could not stay out there if he is ambitious and wants to do something for himself, and he will not stay out there if he can't have an interest or be permitted to acquire an interest.

125 WILLIAM OLIVER CULBERTSON, JR., called as a witness on behalf of petitioners, being duly sworn, testified, as follows:

My name is William Oliver Culbertson, Jr.; I live close to the little town of Bueyeros, New Mexico on the ranch.

State of Texas,
County of Tarrant.

Benjamin L. Bird, being duly sworn, says that he is the attorney of record for W. O. Culbertson, Sr. and Gladys Culbertson, petitioners in the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge, except as to matters therein alleged upon information and belief and as to those matters, he believes them to be true.

BENJAMIN L. BIRD
(Benjamin L. Bird)

Subscribed and sworn to before me, this 10th day of October, 1947.

(Seal)

NORMA FLENNIKEN,
(Norma Flenniken)
Notary Public in and for
Tarrant County, Texas.

My business is ranching. W. O. Culbertson is my father. I was born on a ranch near Tucumcari, New Mexico. My father was in the partnership of Coon and Culbertson; I worked for that partnership. I have lived on a ranch practically all of my life but I drew my first check from that partnership when I was twelve years old. That was for moving some cattle from Dalhart to Moore County. We pastured cattle on a place Mr. Coon had leased. Up until now, I have never worked at anything other than cattle ranching, except the period I spent in the Army. Except during the time I was in school or in the Army, I have devoted all of my time to working on a ranch. Up until 1939, that ranch was used by Coon and Culbertson; since then, it has been used by W. O. Culbertson and Sons. I performed my first services for Coon and Culbertson at the age of twelve. I was born in 1915. From the time I began working for them, I worked about three months out of the years, and on week-ends, and any other chance I had to go out to the ranch. When I began working on the ranch at twelve years of age, I was riding and looking after cattle and as I grew older, I began to take over such jobs as tattooing, taking care of all breeding stock, making out registration papers and any other kind of work that pertained to the commercial herd or registered herd. The commercial herd consists of pure bred cows which are not registered. However, all Coon and Culbertson cattle were registered up until the last years of that company. The registered herd consisted of pure bred Hereford cattle that we carried registrations on. The American Hereford Association issues the registrations. That is the source of registrations of all pure bred Herefords in the Untied States. Tattooing is the method we have of marking each calf. We give each calf a number on our records, knowing the dam and the sire and this mark keeps the records straight and helps us in making out registration applications. Tattooing a number

NOTICE OF FILING PETITION ON REVIEW

109 Filed Oct. 14, 1947.

United States Circuit Court of Appeals for the Fifth Circuit.

W. O. Culbertson, Sr., Petitioner on Review,
vs. Docket No. 4184.
George J. Schoenemin, Commissioner of Internal Revenue, Respondent on Review.

Gladys Culbertson, Petitioner on Review,
vs. Docket No. 4185.
George J. Schoenemin, Commissioner of Internal Revenue, Respondent on Review.

To:

Charles Oliphant, Esquire,
Chief Counsel, Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.,
Attorney for Respondent on Review.

You are hereby notified that W. O. Culbertson, Sr. and Gladys Culbertson did on the 13th day of October, 1947, file with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit, of the decision of the Tax Court of the United States heretofore rendered in the above styled cause. A copy of the petition for review, as filed, is hereto attached and served upon you.

of Coon and Culbertson. I had been with him to Dalhart many times previously and I was acquainted with Mr. Culbertson, the other partner in Coon and Culbertson and with the Culbertson family. Mr. Coon was well acquainted with Mr. Culbertson's four sons.

At this point the Court sustained an objection to a question concerning Mr. Coon's opinion of the Culbertson boys as cattlemen.

Coon and Culbertson had been breeding exceptional Herefords; Mr. Coon had had Hereford cattle before Coon and Culbertson was organized; Hereford breeding was a matter of great concern to Mr. Coon. Between the years 1932 and 1939, I was up there different times during that time and during the vacation time all of the Culbertson boys were out on the ranch and W. O., the oldest one, was practically in charge of the ranch. During those times the partnership must have had five or six thousand head of cattle.

The partnership of Coon and Culbertson was dissolved in 1939. They began to liquidate the cattle along in the spring and they had got down to where they had, I judge, between fifteen-hundred and two thousand left and Mr. Coon was very concerned about what would be done with these pure bred cattle; they were registered. He told me in October that he had a proposition from Mr. Culbertson to buy about fourteen-hundred head. I was present when Mr. Coon had the transaction with Mr. Culbertson resulting in the sale of his interest in the partnership. On the last day of October, 1939, I believe, we had dinner and went to the Coon and Culbertson office in Dalhart where Mr. Culbertson and Mr. Coon talked; I was just a bystander. But I was present when that transaction was completed. Mr. Coon remarked to Mr. Culbertson that he was going to accept Culbertson's proposition provided

the latter would sell his half-interest to the Culbertson boys; that is, that Mr. Coon would sell his half-interest to Mr. Culbertson provided Culbertson, in turn, sold the half-interest to his sons at the same price Coon was charging; Dick had stated in the beginning that Culbertson was offering him for his one-half interest in the cream-of-the-crop, the price at which the whole herd averaged in the prior sales. In that conversation, nothing more was said about a partnership than what I have just stated.

I am not related in any way to Mr. Culbertson or any of his family and I have never been associated in business with him or his family.

Cross Examination.

I have been a lifetime friend of Mr. Coon and Mr. Culbertson; I would probably make a trip out to Dalhart four or five times a year from 1932 to 1939; I saw the Culbertson boys every time I was up there. Mostly these trips were in the summertime and the boys were on the ranch. Eugene might not have been able to do much work on the ranch, but he was there; most farmer's boys are on the farms between schools.

At the time of the conversation in the partnership office at Dalhart, Mr. Coon told Mr. Culbertson that he would sell his one-half interest in the partnership property if Culbertson would sell it to his four boys at the same price.

114 W. H. COON, called as a witness on behalf of the petitioners, having first been sworn, testified as follows:

My name is W. H. Coon; I live at Dalhart, Texas. I am not related in any way to W. O. Culbertson or any

of his family, nor associated in business with him. I am Uncle Dick Coon's nephew and assisted in the management of his Panhandle properties, rental properties, real estate and ranches. I acted under written power-of-attorney. I was his attorney-in-fact starting about 1926 and continued until his death, until 1941. Mr. Coon was in the cattle business prior to 1915, but from 1915 until the end of 1939, Coon and Culbertson were partners engaging in the production of pure bred registered Herefords. They had a very large herd of good quality, uniform bred Herefords, which were unusual. Mr. Coon had started the breeding of that herd of Herefords in about 1902. Breeding Herefords was his hobby and he enjoyed it.

From 1932 until 1939, I was acquainted with the Culbertson boys—W. O., Jr., Richard, Joe Jack and Eugene Culbertson. From 1932 to 1939, those four boys spent all of the time they were not in school working on the Coon and Culbertson ranch—that is, week-ends and summer vacations. They did all of the kinds of work on the ranch that boys of their age could do—riding horses, helping drive the cattle, tattooing, branding and observing. The youngest boy, Eugene, was around eight years of age in 1932. When he became a little older, I have seen him tattooing calves.

Prior to Mr. Coon's death in 1941, Coon and Culbertson was dissolved because of Uncle Dick's health and the fact that he was seventy-nine in 1939. Liquidation of the partnership assets started in the first part of 1939. Mr. Culbertson purchased what I would call the brood or foundation herd, the best age cattle, the remnants after the other cattle had been sold. Culbertson did not buy commercial cattle, but the best, the pure bred stuff. This sale occurred in October, 1939. I was present at the discussions between Mr. Coon and Mr. Culbertson leading up to this sale. This conversation occurred in the Coon-Cul-

bertson office one night; Mr. Culbertson, Mr. Coon, Mr. Williams and myself were present. We were there two or three hours as I remember. Mr. Coon discussed this herd; the ups and downs we had been through, the drouth, what a wonderful herd it was, and what luck we had had in liquidating and cleaning up. We had went through some pretty tough periods. Mr. Coon wanted the herd to go on and he knew Mr. Culbertson did too. I don't remember his exact words in that connection but Mr. Culbertson had made him an offer on these cattle that would clean him up and I recall that Mr. Coon didn't think that Mr. Culbertson could carry that herd on by himself, due to his age. Mr. Coon told Mr. Culbertson, "You can go on with it with the assistance of your boys" and he said, "I will accept your proposition. I will sell you my interest in these cattle if they can take my place, if you will sell it to them, just like I sell it to you, and continue on with this herd of cattle, providing they want to do it." Mr. Coon added, "W. H. (meaning me) here will close the deal with you." Mr. Culbertson said, "I will discuss it with the boys. I am sure they will." In accepting Mr. Culbertson's proposition, he stated that he was willing to accept it if the Culbertson boys would step into his place, that is what he meant by saying that he would sell to Mr. Culbertson if Culbertson, in turn, sell to the boys so that they would take his place. I don't recall that right at that time anything was said about the price which Mr. Culbertson was to pay, but definitely the condition was that the Culbertson boys were to pay Culbertson the same price which Mr. Coon was selling for. That sale was carried out. We knew approximately how many of the brood cattle would come under this sale. Ten days or so later, the first part of November, we tallied the cattle and I gave Mr. Culbertson a bill of sale covering the cattle.

Thereupon, Petitioner's Exhibit No. 1, being a bill of sale from Coon and Culbertson, signed by R. S. Coon and W. O. Culbertson, to W. O. Culbertson was introduced and admitted in evidence.

The date of that bill of sale was the same date as the check, November 4. After Coon and Culbertson executed and delivered to W. O. Culbertson the foregoing bill of sale, Mr. Culbertson executed and delivered to the four Culbertson boys a bill of sale to an undivided one-half of the same cattle described in Petitioner's Exhibit No. 1.

I was present when the bill of sale from Mr. Culbertson to the four sons was prepared and I witnessed it. That bill of sale was delivered to the four boys on November 6, 1939, and I was present when it was delivered.

Petitioner's Exhibit No. 2, a bill of sale from W. O. Culbertson to W. O., Jr., Richard, Joe Jack and Eugene Culbertson, covering an undivided one-half interest in the cattle, was thereupon offered and admitted in evidence.

The reason that the sale took the form of a transfer from Coon and Culbertson, with another transfer from Culbertson to the boys, was because the cattle were owned by Coon and Culbertson and our partnership books were set up that way; I suggested that the transaction be handed in that manner.

After the bill of sale to Mr. Culbertson was delivered, he paid $99,440.00 for the cattle. At the time Mr. Culbertson delivered the bill of sale to his four sons, Petitioner's Exhibit 2, I understand that the four Culbertson boys gave Culbertson a note for the purchase price of their half-interest.

Later, Uncle Dick Coon inquired of me as to whether Mr. Culbertson had actually conveyed a half-interest in

these cattle to the boys. It was my impression that on delivery a partnership between Mr. Culbertson and his four son was formed; I interpreted it as a partnership; they were the owners. The existence of a partnership between Mr. Culbertson and his sons was widely publicized in and around Dalhart and in the Hereford business. This page from a newspaper is an announcement of the dissolution of the Coon and Culbertson Ranch, giving the history of the ranch and telling of the sale to Culbertson and Sons. This is a news item in the local paper, the Dalhart Texan, which appeared on December 2, 1939. Thereupon Petitioner's Exhibit No. 3, being the newspaper announcement mentioned, was offered and admitted in evidence as proof of the publicity given to the transaction.

The registration of these pure blood Herefords was changed by the issuance of a new certificate to Culbertson and Sons; this certificate was issued by the American Hereford Association, Kansas City, which is the registry, or the central point at which all fine Herefords in the United States are registered.

At about the time of these sales, Mr. Culbertson asked me to assist him in establishing a new line of credit for Culbertson and Sons with the National Finance Credit Corporation. I then wrote to A. A. Wright, head of the National Finance Credit Corporation, explaining our sale; that concern is one of the leading cattle loan companies in the State of Texas. I wrote the letter at Mr. Culbertson's request. Such letter, dated October 23, 1939, from W. H. Coon, to A. A. Wright, National Credit Finance Corporation, Fort Worth, was offered and admitted in evidence as Petitioner's Exhibit 4. During 1940 and 1941, I was out to the Culbertson ranch, where this herd of cattle was being handled, possibly three times. I am familiar with the work on the ranch which the four boys were doing. When I was out there during 1940 and 1941,

W. O. Jr. was managing the ranch and the other boys were there working.

"(By Mr. Bird):

"Q. Mr. Coon, in order to clarify a point which Mr. Kelley just made, in the conversation betwen R. S. Coon and Mr. Culbertson on the night which the deal was made in Dalhart on October 1939, did Mr. Coon, in accepting Mr. Culbertson's proposal, say anything about the four boys working—becoming partners with their father?

"A. That was the intention.

"Q. What did he say?

"The Court:

"Strike the answer: I don't care to hear any statement of somebody's intention. Tell me what he said.

"The Witness:

"I thought I covered it. He brought out that Mr. Culbertson couldn't go on, or in his opinion he couldn't go on. He so expressed that by himself, and he wanted this herd to continue. It was a lifetime work. He wanted Mr. Culbertson, he was selling to Mr. Culbertson on the condition that Mr. Culbertson sell it to his boys at the same price. Does that answer it?

"(By Mr. Bird):

"Q. Was anything said about the formation of a partnership between Mr. Culbertson and his sons?

"A. He used the expression 'continuing in my shoes just like we have, Bill'."

After the bills of sale dated November 4 and November 6, Mr. Coon repurchased about four-hundred head of the cattle; W. O. Culbertson and Sons purchased the Coon

and Culbertson grass leases, the horses and the ranching equipment subsequent to the execution of these bills of sale.

Cross Examination.

The execution of the bill of sale from Coon and Culbertson to W. O. Culbertson took place in their Dalhart office; Mr. Culbertson, R. S. Coon and myself were present when this bill of sale was executed and delivered; Mr. McClinton, a cattle inspector, witnessed one of them. Mr. Robinson is our bookkeeper. I was a witness to the bill of sale from W. O. Culbertson and Gladys Culbertson to the four Culbertson boys, conveying the one-half interest in the cattle. I was present at the time, but I don't recall who else was present. W. O. Culbertson, Jr. was present at the time this last bill of sale was delivered to the boys; he is the only one I remember talking to about it at that time; the other boys might have been at the ranch or in town; W. O. Culbertson, Jr. was pretty happy about the transaction; I shook hands with him and congratulated him. Mr. Culbertson and the boys took the bill of sale and while I know the deal had been made, I don't know what was done with the bill of sale.

I was out at the ranch two or three times in 1940 and 1941 trying to buy some calves. In the summer of 1940, I saw W. O., Jr. who was then foreman, having charge of the ranch. W. O., Jr. was boss but a boy named Ed McMahon was working. I don't recall who else was there. During the year I have seen all of the boys there at one time or another; I possibly saw Richard there in 1940 but I can't recall about 1941. I don't know whether I saw Joe Jack out there or not.

Re-Direct Examination.

During all of the transactions which I overheard with respect to the sale between Mr. Coon and Mr. Culbertson and with respect to the bill of sale from Mr. Culbertson to the Culbertson boys and in all the talks between Mr. Coon, Mr. Williams, Mr. Culbertson and W. O. Culbertson, Jr., there was never any mention made whatsoever of the word "taxes". No one mentioned that anything they were doing might have any bearing on any sort of taxes.

Examination by the Court.

The four Culbertson boys lived on the ranch when they were not in school; their home was on the ranch; Mr. Culbertson had a home in town which he and his wife used, but the boys stayed with the ranch. When the boys were small and were in school, they went out to the ranch, for summer vacations.

120 A. A. WRIGHT, called as a witness on behalf of the petitioners, after being duly sworn, testified as follows:

My name is A. A. Wright and I have lived in Fort Worth since 1930. Since 1930 I have been manager of the National Finance Credit Corporation of Texas; the business of this corporation is loaning money on cattle, sheep and goats and as manager, my duties are to pass on loans and manage the business.

Prior to 1939, we were carrying to Coon and Culbertson partnership loans. These loans were practically paid off. I was familiar with the dissolution of the Coon and Culbertson partnership and I think that their loan was

practically retired at the time of the dissolution. I was advised of the formation of a partnership called W. O. Culbertson and Sons. My first notice of the organization of W. O. Culbertson and Sons was upon receipt of Exhibit 4, a letter from Mr. W. H. Coon to me, or at the time Mr. Culbertson called on me and advised me of formation of such partnership. After October 23, 1939, the date of Exhibit 4, I had a conversation with W. O. Culbertson concerning a line of credit. Mr. Culbertson came in to discuss borrowing funds for W. O. Culbertson and Sons and explained to me the partnership transaction; as there were some minors in the deal, I told him he would have to prepare some kind of document whereby he could qualify authorizing him to sign for the minors. I told him he would have to prepare it. I presume he followed my advice because we later received a document which we turned over to our attorney and the attorney stated that the document served our purpose. At the time Mr. Culbertson talked to me, I do not know whether he had any sort of written partnership agreement between himself and his sons.

I have been in the cattle loan business since 1930 and during that time National Finance has loaned a little over three-hundred million dollars; it now has outstanding about five and a half million. In my capacity as manager of National Finance, I occupy a confidential relationship with cattlemen who borrow money from the company. They frequently discuss their plans and problems with me. The proposition of forming father and sons cattle partnerships arises frequently in the cattle business and it has arisen frequently in my experience. I have adopted a policy, with respect to inquiries from present or prospective borrowers, in discussing what they should do with their children; in discussing a loan we often talk with cattlemen of what procedure concerning carrying on the business, should be followed in case the cattlemen be-

came incapacitated; if he has any children and they have prospects of becoming cattlemen, we encourage his taking those children into a partnership. We feel that it strengthens the deal. In the majority of such instances, the children in those situations do not have any funds. Where the son does not have any capital, I have recommended and suggested to the father that he take his notes, or make him a gift or adopt different means that meet the requirements of a partnership. From our viewpoint, the creation of such a father and son partnership gives better security for the loan; also it gets someone else interested in the deal and as we contemplate that a loan, especially if it is a breeding loan, will be carried over a good many years, we are naturally interested in how the operation is going to be followed out before the loan is eventually retired. The cattle business is a lifetime proposition. While I know some exceptions, the general rule is that successful cattlemen are born and raised on ranches.

A check of our records indicates that about ten percent of our loans are made to partnerships consisting of fathers and sons or fathers and sons-in-law. These loans are made in the name of so and so and sons. Where the name of a father and son partnership is the so and so cattle company, we do not know usually whether it is a father and son partnership or not. The formation of father and sons or father and sons-in-law partnerships are a very usual thing in the cattle business.

Cross Examination.

Mr. Culbertson came to see me about obtaining a line of credit some time in the fall of 1939.

"Q. What was that conversation, Mr. Wright?

"A. Well, that he was forming a partnership with his sons to take over his interest of the Coon and Culbertson

Cattle and he wanted to obtain a loan, pay his part of the partnership, whatever you want to call it.

"Q. Did he say—did you ask him if if was a written partnership agreement?

"A. I didn't go into that.

"Q. Well, did you suggest the type of document to be prepared?

"A. I did not suggest anything except I asked him the ages of his sons and ascertained some were minors and I told him in case we handled a loan, we wanted him to have authority to sign for these minors. Beyond that we weren't interested in the document."

A few days later he sent the document to me; I showed it to our attorney; he said we could accept it. On the basis of that document of December 8, we extended a line of credit to the firm of Culbertson and Sons; we have been carrying it ever since. Since that time, Mr. Culbertson has not advised me that that document was null and void. I do not recall whether he told me that he filed a petition in the District Court of Dallas County, to have the document declared null and void. I do not know that a District Court of Texas has declared that document null and void. He didn't tell me of these things. My company has relied on it as being authentic. That document purported to create a partnership. I do not know what it purported to create; all we were interested in was qualifying him to sign W. O. Culbertson and Sons. Since that date, it has been in my office and I have relied on it as a basis for this line of credit.

Re-Direct Examination.

I couldn't say whether Mr. Culbertson was in my office and talked to me in 1939 before or after I received Exhibit 4, which is dated October 23. I know that it was

in the ear is our method of identifying a particular calf. We know the dam and the sire of a particular calf because we run only one herd sire with a particular group of cows in a certain pasture; we have a list of all tattoo numbers of all cows in this pasture and we have one certain herd sire with these cows. We keep a record of the cows and bulls in any one pasture.

Prior to 1939, I was not acting as foreman of the Coon and Culbertson ranch. I finished high school in 1933; after that I stayed on the ranch for a year until I was financially able to start to A. & M. College the following year. I was not financially able to go to college; at that time I had no source of revenue that would put me through school. Mr. R. S. Coon helped me go through college; he promised to and did loan me money to go to school. I entered A. & M. in the fall of 1934, taking an animal husbandry course at the suggestion of Mr. Coon and because I thought it the best course to help me along in ranching and later years. Mr. Coon recommended that course. I got out of A. & M. in 1938, went to the ranch and took over as foreman. In 1939, the partnership of Coon and Culbertson was dissolved. I first heard of the proposed dissolution in the summer of 1939. I was foreman at the time I heard about the dissolution. Along in the late summer of 1939, I attempted to buy, on behalf of myself and my brothers, some of the Coon and Culbertson cattle. At that time we were raising Bradford cattle, a cross between the Brahma and Hereford for South Texas trade. We had carried these cattle for a number of generations and Coon and Culbertson had them up for sale in the summer of 1939. With the experience that us boys had had, I hated to see them go as we had a market for them. So I approached Mr. Coon with the idea of us boys buying this particular herd of cattle and I also spoke to my father about financing the herd for us and he said we could handle it. So we made a trade

with Mr. Coon whereby my brothers and myself took the Brafords, about 350 some odd head. As part owner of Coon and Culbertson, my father had an interest in that herd. The trade was between Mr. Coon and my father and us boys; I talked to both. My three brothers and myself bought those cattle but we did not pay for them or receive delivery because at about that time, a friend of Mr. Coon's and ours from South Texas asked Mr. Coon if he couldn't buy these Brafords; Mr. Coon informed him that he had already traded with me and my brothers on these cattle and that it was too late; he told the friend that he might talk us boys into selling the cattle to the friend at a profit but that it would be up to the boys to decide. We very seldom crossed Mr. Coon because he was a great friend of ours and if he wanted to sell these cattle to a certain person and we were getting a profit out of it, we saw no reason why the friend, Mr. East, couldn't have them. At the same time, Mr. Williams suggested that we sell these cattle and later try to get some Hereford cattle. We sold the Brafords to Mr. East at a profit of $5.00 a head; Coon and Culbertson made delivery to Mr. East.

I have outlined for the Court my personal experience as I grew up from a boy in the cattle business. The experiences of my three brothers, Richard, Joe Jack and Eugene have been practically identical with mine. Their services on the ranch up to 1939 were similar to mine in the fact that they did practically the same kind of work from a technical standpoint. Richard went to work on the ranch at about twelve years of age and that is true with respect to Joe Jack and Eugene. Their services were similar to mine. Each of my brothers graduated from high school; Richard finished A. & M.; Joe Jack is due to finish the last term shortly; he had to drop out due to the war. Eugene is going to a business college in Amarillo.

After the middle of October, 1939, my father discussed with me the formation of a partnership between him, my three brothers and myself. Dad came out to the ranch one day and told me that Uncle Dick had said he wanted my brothers and myself to own his interest in the Coon and Culbertson herd and dad asked what we thought about it. I don't think my two brothers were present at that time but they were that night. It had been my idea all along to some time or other I'd get a start from that particular herd and I thought very well of Uncle Dick's suggestion. That evening when we saw the other boys, we talked it over. Of course, the other boys were of the same opinion as myself; questions arose about financing the acquisition of Uncle Dick's interest and what we would name the ranch. A deal like that was a pretty big thing for these boys and financing the purchase was the first thing we thought of. I asked my dad how we would go about financing it and he said he could help us out and finance it for us. I don't recall exactly the price my three brothers and I were to pay for the interest in these cattle, but it was the same price at which my dad and Mr. Coon had settled on. I think it was $60.00 a head for the cows. My brothers and I were buying an undivided one-half interest in the entire herd—an eighth for each one of the four boys. We discussed the possibilities of a number of names for the organization. We talked about calling it the Culbertson Cattle Company; Culbertson Land and Cattle Company, but as we didn't have any land, we immediately discarded that. We finally decided on W. O. Culbertson and Sons due to the fact I had heard of other ranches called so and so and son. We have a neighbor, T. E. Mitchell and Son and his ranch has ben going along for fifty years. We finally decided that would be a good name since all of the boys were in the partnership. The group of cattle described in Petitioner's Exhibit No. 2—the bill of sale from W. O.

Culbertson and Gladys Culbetrson to me and my three brothers—were the cattle involved in the conversation I have testified we had with my father; there was a little change in these cattle; a little later on some cattle were overlooked, but these were generally the cattle we had in mind. Referring to a check dated November 4, 1939, in the amount of $99,440 which my father gave to Coon and Culbertson for the purchase, me and my three brothers agreed to pay my father half of that amount, about $49,700. The first time I ever saw Petitioner's Exhibit No. 2, the bill of sale, was one evening during the first part of November in the office; the bill of sale is dated the sixth of November. Mr. Coon, Mr. Culbertson, our bookkeper, W. R. Robinson and I were in the office; I think H. Coon was there. In the office, at that time, the bookkeeper made out his bill of sale and my dad signed it and H. Coon, who carried on Mr. Coon's business—signed for Mr. Coon; my mother wasn't there at that time but she was to sign the bill of sale. My dad took the bill of sale down to her, as I recall, and they later brought it back to the office and handed it to me. We made a few remarks about it and of course it looked good to me. I handed it to the bookkeeper and told him to file it. The next day, my brothers and I made a note for our payment of the bill of sale; this note was for $49,000. I do not have the note but as I recall it, it was for four percent and due a year from date. That note was signed by my three brothers and myself. It was signed by me and two of my brothers at that time and later by the other brother. This note was turned over to my dad.

(At that point, the Court adjourned until the following day, Wednesday, November 13, 1946 at 10:00 A. M.) at which time—

WILLIAM OLIVER CULBERTSON, JR., having been previously duly sworn resumed the stand and testified, as follows:

130 Direct Examination (Cont'd.).

With respect to the terms of the partnership between me, my three brothers and my father, when W. O. Culbertson and Sons was formed, my three brothers and I were to take a half interest, we bought a half interest in the ranch; my dad retained the other half. In other words, we had an eighth. With respect to profits and loss, all of the profits would be shared alike; we would take the proceeds from this ranch. There was a mutual agreement between my brothers and me to pay our note; it was to be handled as a company, a partnership, and no individual was to have any more right than the other but we'd all have a right to manage the ranch. Personally, I was to have no more interests in profits and losses than any of my brothers. I had an eighth interest and each of my brothers had an eighth interest; my father had a one-half interest. After my conversation with my father at the ranch about the partnership, I saw Mr. R. S. Coon a little while later in Dalhart, at which time we had a talk. I saw him in the hotel one evening and, of course, I wanted to thank him for his interest on behalf of my brothers and me; I had understood from the beginning that it had been his desire that we take a half-interest in this ranch and I wanted to thank him for it. The thing I wanted to thank him for more than anything else was the price we got for the cattle, a good price I thought. It was his intention that we take this herd and go on with it. That herd of cattle had taken several years to build up and he wanted to see us get a good start and he wanted us to take this old herd, you might say, and go on with it. That gave us quite an advantage. There were

several things that came up about our partnership and about the financing. He said, "Now, have you got the thing financed?" "Yes, I think so." He said, "Well, if you run into any diffuclty, I think I can handle it." I told him it wasn't any use as we had already made arrangements with my dad. With reference to his statement that he wanted us to carry on with the herd, I understood that he meant for us to carry on this particular strain of blood in the breeding of Herefords.

My opinion in 1940 and 1941 concerning the essentials of fine Hereford breeding included three phases: one, feeding and care and an understanding of what types of feed to feed certain ages and classes, registered Hereford cattle take constant care; two, it is very essential to have proper blood lines which we had established over a number of years; the maintenance of these blood lines required an understanding of outcrops and the types of breeding you want to get into; last, is the sound breeding program—selective breeding, taking one certain individual and crossing with a number of particular cows with the thought in mind of establishing a standard of perfection. You have to have in mind the type of animal you want to develop. You get as close to the standard of perfection as you can but it is never reached. In 1940 and 1941, I was handling the breeding of the fine Hereford stock that W. O. Culbertson and Sons had on hand, which we had acquired from the partnership. It is hard to describe the standard of perfection which was my ideal. Any master breeder wants a short, compact heavy set low to the ground animal showing quality, breed character and substance. We call it "bone". We have a kind of model in mind we strive to develop. The essentials of ranching, as differentiated from breeding, requires the consideration of lots of things; like any other business, it is more or less divided into phases. You have the maintenance and care of cattle on the ranch, the administration of the

ranch, working with your men when different jobs come up, and keeping up with the water. Then you have the trading end and the financial end; someone has to finance the thing and maintain contacts with cattlemen. At the time the bill of sale was delivered to me and my brothers by my father, no strings were attached to it other than that we owed for our note. My father did not state that there were any conditions attached to the title which my brothers and I were then taking. We had to pay for the note but otherwise our title was clear.

The amount of the note which my brothers and I gave at the time the bill of sale was delivered to me was changed at a later time. (Petitioner's Exhibit No. 6, a note dated January 1, 1940 in the sum of $57,674.80, was identified by the witness as a note given by him and his brothers, payable to W. O. Culbertson and wife, Gladys Culbertson); the signatures on this note were those of Richard Culbertson, Joe Jack Culbertson, Eugene Culbertson and myself.

Said Petitioner's Exhibit No. 6 was then admitted in evidence.

The reason of the change from the $49,000 note to this second note was because this note included some material and a few head of livestock which had not been included in the first note; some grass leases, saddle horses and a few odds and ends had not been included in the first note; the first note was for the foundation herd of cattle and at that time we did not know what we were going to do with the old saddle ponies and they were left out. Later on, it looked like Coon and Culbertson were not going to liquidate some bull calves they had intended to liquidate. These calves were on the ranch and something had to be done with them. We decided to take them and sell them next spring, which we did, and we included that

in the note. We included them in this note but a little later Coon and Culbertson sold these cattle and our note was credited in a like amount.

After the formation of the partnership of W. O. Culbertson and Sons, a bank account was opened; books were set up which, when we finally got everything set up, were dated back as of November 1st. This sheaf of papers you hand me are a part of the books of W. O. Culbertson and Sons. Looking at these accounts, and with respect to the dates of the first entries on these books, here is one labor account dated October and November, 1939.

(At this time, the attorney for the defendant objected to the testimony of the witness on the grounds of qualification; said objection was overruled by the Court on the ground that a member of a partnership would know what the books were and whether certain books were his. The attorney for the petitioners stated that the intention was to prove the dates of the various accounts.)

The various accounts were set up here as of October and November, 1939.

As of January 1, 1940, I was twenty-four years old; my brother, Richard, twenty-two; Joe Jack was eighteen and Eugene was sixteen. They were all normal boys, capable of doing a full ranching day's work. I am married and was married in December of 1940; Richard was married in the spring of 1940 and is now married. Joe Jack and Eugene are not married.

During the year 1940 Richard was going to school but he spent some time at the ranch. I wouldn't say just what extent he worked on the ranch during that time. I don't recall whether he spent any time on the ranch during 1940. With respect to 1941, he graduated in that year and went directly into the Army; he graduated dur-

ing the latter part of May or the first of June of that year from Texas A. & M.. We had discussed what he was to do when he got out of school and our plans were to divide up the work on the ranch among all of us boys; in other words, I was to take care of the registering of cattle. He'd probably take the commercial cattle; probably my brother would take the bookkeeping work there in Dalhart and contact the buyers. He—my brother—had some education along those lines and until he took up that work, he'd probably tattoo or do some essential work on the ranch. During 1940, Joe Jack worked on the ranch during the summer before he started to school for three months; he did not work any during the school term. After 1940 he went to Texas A. & M. and came back during the Christmas holidays. He did not perform any of the services on the ranch during school term, after college. Joe Jack started to college beginning at the fall term 1940 some time about the first part of September. Joe Jack rendered services to the partnership during the summer of 1941. Eugene rendered services to the partnership during the summer and while going to high school in 1940; during his schooling term he worked on week-ends. During 1940 Gene came out during week-ends, for a day or two, to help with whatever we were doing. In the summer he rode after registered cows and had something to do with the registrations. We all pitched in and helped make those. That is quite a job in the fall, and as I recall, he helped tattoo that year, but I wouldn't say positively. Eugene was going to high school during 1941 and he rendered services to the partnership in the summer of that year; these services were generally of the same type I have mentioned.

It was satisfactory to me, personally, for my brothers to go to college and still get their share of the partnership profits; this was because we had all agreed that any education we had would help the partnership at a future time when we all came home.

As far as I knew, a partnership composed of minors was good in every way.

During 1940 and 1941 I hired all of the hands that worked on the ranch. I was foreman and I fired them; I made out the payroll and our bookkeeper paid them. Operating expenses of the ranch were handled through accounts or statements sent to me and after my okay were sent directly to the office and a check sent to the concern involved. Usually our bookkeeper, W. R. Robinson, signed the checks. I directed the care of the cattle during 1940 and 1941; I directed the breeding; occasionally I discussed the breeding and care of the cattle and the operation of the ranch with my father. It would be my guess that my father was out at the ranch on an average of once a month during 1940 and 1941. During the years 1940 and 1941, all of the partnership income was from cattle. During those years, Richard, Joe Jack, Gene and I were free to check on the partnership bank account; there was nothing ever said against it. When we needed money, we drew from the company, from Mr. Robinson. During those years each of us drew what we felt we needed; we had an understanding on that. We all drew a little money along for living expenses—what we thought we might need; we would all draw about the same. We didn't want one to draw more than the other at any time and we kind of set it up on an equal basis. This was the agreement between all of the partners in the partnership—the four boys and my father. Petitioner's Exhibit No. 6, the $57,000 note was paid off but first, there was a gift of $1,000 apiece, $4,000 in all from my dad. The date of that gift was December 30, 1940. Going back a little bit further, certain cattle were included in the $57,000 note and Coon and Culbertson later liquidated those cattle; we were given a credit in January, 1940 with respect to these cattle; it was the first of 1940, $5,930.

This credit reduced the note to $51,744.80. The next credit on the note was on June 10, 1941 in the amount of $30,000. W. O. Culbertson and Sons borrowed $60,000 on the cattle; this money was turned over to my dad and he credited our note for half of that because we owned half of the cattle. The other $30,000 was his of course. We drew it on the cattle. That $30,000 credit reduced the amount of the note to $17,744.80. That balance was discharged by another gift from my father on June 10, 1941. As of June 10, 1941, the $57,000 note had been paid out either by gifts or the transaction I mentioned.

The first time that I ever knew of the existence of the document signed by my mother and my father on December 8, 1939, identified as Petitioner's Exhibit No. 5, was while I was overseas, after May 1943; the first time I knew about it was when my dad wrote me and stated that he had a document which involved income tax some way or other and there was some question according to this document whether the partnership was valid and whether we owned the partnership. He didn't tell me a lot about it and I didn't know a thing about it. He suggested we take this to a Civil Court and determine whether or not our partnership was valid, a true partnership. He asked me what I thought about it and I told him, above all, to go on and straighten the thing out because it was my understanding we did have a partnership and I would like to have it cleared up. I don't know whether my brothers knew anything about that document before I did; so far as I know, they did not. I did not sign that document at any time. In the letter to me, I don't recall that my father went any further than to suggest we go to some Civil Court and straighten the matter out; he said the four of us boys would have to bring suit against him to straighten it out; sue him to see whether our partnership was good or whether this

document was good. I authorized him to have that suit brought.

At no time during any of the 1939 transactions did I hear anything said or mentioned about taxes; the possibility that anything I was doing might have tax effect never occurred to me.

Cross Examination.

I finished A. & M. College the last part of May, 1938, May 20th, I think. I was not in high school all the time prior thereto. I stayed a year on the ranch between my graduation from high school and the time I started to Texas A. & M. College. During the years I was at college, I just worked on the ranch during summer times. During the years 1934 and 1935, the Coon and Culbertson herd was quite large; as a guess I think we had around 5,000 or mybe more cattle at the time. The biggest part of them were registered stock but we started the commercial herd some time in 1936, I think; I am not certain. My father had a half interest in the herd.

I said yesterday that I had to go to somebody else to get funds to go to college; Uncle Dick loaned me money. Uncle Dick is not related to me. I talked to my father and he wanted me to stay on the ranch and make a little money; he didn't feel able to send me to college at the time. Those cows were valuable in 1934, I guess; probably a hundred thousand dollars.

After I got out of A. & M. in 1938, I started working at the ranch as foreman for Coon and Culbertson. I was the overseer. That continued on in 1939 and 1940 under the same arrangement, there being no change other than that I, of course, took care of the ranch, bought some feed, bought groceries, hired the men. In 1940 and 1941, my father principally did the selling, contacting the buyers. When we decided to buy some steers, it was by

mutual agreement before we went into anything like that. In 1938, I was getting about a hundred and a quarter, I imagine, counting a dividend we drew. It was probably something like one hundred dollars a month which we drew from the company. I started out with seventy-five dollars one time. In 1940 and 1941, my salary was one hundred dollars a month and board, which included my wife's board. The ranch is ninety-three miles from Dalhart. The partnership agreement between me, my brothers and my father, the oral partnership agreement of the early part of November, 1939, probably took effect, geographically, in Dalhart, I think. My brothers were present at the ranch in the fall of that year and we arranged for a partnership at that time—that was the first discussion after Mr. Coon had decided to sell his interest to us boys. My dad came out and we talked it over. Gene and Jack were out at the ranch as I recall. I don't know what day of the week it was or whether it was on a week-end. With respect to what was said about the creation of this partnership at that time, as I recall, my dad came out to the pasture and said, "Well, Uncle Dick wants to sell you boys his interest in the ranch." We had been looking for something like that all along. It wasn't really news to us in a way because we had often thought of that, hoped for it, and dad said something about what I thought of it. "Of course, you know what I'd think. He said, "I wonder what the boys will think about it?", and I said, "Well, you know what they wil say." We talked it over later with the boys who were there. Richard was in A. & M. at the time. The purchase of the cattle by my father from Coon and Culbertson and the sale by my father to me and my three brothers and the creation of the partnership was all one plan. I don't know just how it was divided up. What I mean is, it started when Mr. Coon wanted to liquidate due to old age. It was his idea that us boys,

would get his interest as an eighth apiece and it materialized that way. I wouldn't say I know what part I played in a lot of this business agreement. I guess our purchase was made at that time of the bill of sale. I understand that the partnership was created at the time we purchased the cattle from my father. We gave the note, dated November 6, for one-half of the purchase price which my father paid to Coon and Culbertson, to my father. I don't know where the note is now; it is tore up. We made another note later. The note of January 1 for $57,000 took the place of the original note and some additional money. I entered the Army on March 7, 1942. On January 1, my three brothers and I executed a note to my father in the amount of $57,674.80. The increase in the note came about this way: it started by a liquidation process of Coon and Culbertson; some of those cattle were liquidated and some were not. You can't sell them over-night. I think we had this string of bulls on our hands. Mr. Coon and H. Coon wanted to wind this up. We finally decided to take the bulls; we could handle them next spring. In the meantime, they found someone else wanted them and the bulls were sold for the price we paid for them, plus five dollars and this was credited on our note. This was the second instance on which I had undertaken to purchase cattle from Coon which were not delivered. In the late summer of 1939, we undertook to purchase a bunch of Brafords, but we never took possession nor got title. Mr. Coon sold them to someone else. This purchase was from Coon and Culbertson, but I never got the cattle. I gave a note before I took title and before delivery and during the same month, we were given a credit for the error. I wouldn't say whether we knew on January 1 that they weren't going to be delivered; it was probably in January.

This left a balance of $51,744.80; on December 30 of that year my father made a gift to us four boys of $4,000, it was credited on the note. On June 10, 1941, the $30,000 which represented one-half of the note of $60,000 which Culbertson and Sons had given to my father, was credited on the note; you see, W. C. Culbertson and Sons borrowed $60,000 from the Finance Company on our cattle and we turned this $60,000 over to my dad. He owned half of it; he owned a half interest in the company; us boys owned the $30,000; he credited that not for $30,000. This wasn't a gift; it was borrowed. On June 10, 1941, my father gave us, as a gift, all of the balance of the note, $17,744.80. It is not right to say that during all of the time from January 1, 1940 to June 10, 1941, none of the credits on that note were from income from the cattle; we had to pay that $60,000 off. At that time, we had no direct income from the cattle which had been applied to the credits on the note.

During the years 1940 and 1941, the other boys worked on the ranch what time they were not in school or not in the Army. They were both there during that year. They were all in school during those years. They couldn't get in much work on the week-ends; they would go out Friday evening and come back Sunday. Mr. Robinson didn't sign all of the checks; I bought a bull and I think I wrote a few checks. I was authorized to do so. As a general rule, Mr. Robinson wrote the checks until his death. I testified on direct examination that some of the items in the partnership books of Culbertson and Sons began in October and November, 1939. Account No. 57, a labor account, shows only two items; these items refer to labor but the only way I would know what they represent is to go back and find the other entries. With reference to your question whether capital accounts were set up either in 1939, 1940 or 1941 for each of the partners on the books of Culbertson and Sons, I don't understand what you

mean by "capital accounts." I couldn't answer your question whether accounts were set up on the books showing the amount of property that I, my brothers, or my father contributed to the partnership or whether anything was contributed because I wouldn't know too much about the books. The bull I testified as having purchased was for Coon and Culbertson. I have never purchased anything since or during the years 1940 or 1941 where I signed the check; nor did my brothers, individually, ever buy or sell any cattle for the partnership during the years 1940 or 1941. The first account of the document executed by my father and mother on December 8, 1939 was when my father called my attention to it by letter to me while I was in the service. I don't know whether he had advised my brothers about that document or not. As I recall, he didn't go into detail in his letter concerning the document. I just told him to straighten it out. He said something about it involving our income tax matters. I don't know anything about the proceedings that were filed in the District Court of Dallam County except what I have learned since I came back from the service. I was not present and I did not hire an attorney in that case; I turned it over to my father. I didn't testify in that case and I have never seen the decree of that Court.

On December 31, 1940, my father discussed with me bringing my sister into the partnership; I don't recall what it was. It was agreeable with me. I don't know whether she was made a partner on that date, December 31, or not. My dad told me that he and mother undertook to sell and convey to my sister Fannie an eighth interest in the partnership. I think our partnership operated during the year 1941 as though she were a partner. We should have filed a rturn for her purported interest in the partnership for 1941. I thought she was a partner. It is my understanding that my sister is a partner in the business.

She had an equal part, one-sixth, in this partnership arrangement. She renders services for the partnership now; she helps operate a store we have in conjunction with our cattle business. That store was bought by the partnership, but not for her husband. Her husband operates it. My brother-in-law is not a cattle man; he's a dry goods man. That store is in Dalhart about ninety-three miles from ranch headquarters. No accounts were set up in these books for that store; we have a separate set of books for the store. I don't know whether any account is taken in the partnership accounts for the operation of that store.

Re-Direct Examination.

With respect to the questions on cross examination concerning the value of the Coon and Culbertson herd in 1934, offhand I don't know the amount of loans that Coon and Culbertson had outstanding in those years, but they did have large loans. This was true in 1938 and in 1939 prior to the liquidation. In 1940 and 1941 the partnership of W. O. Culbertson and Sons was running about 1,400 breeding cows, more or less, and, of course, in 1941, we had offspring from this particular herd. During those years the herd was operated in a ranch of 52,000 or 53,000 acres. We didn't own any of this land; we had the use of the land under grass leases. With respect to the questions on cross examination as to whether our purchase of the Coon interest in the cattle came first or whether W. O. Culbertson and Sons was organized first, the first time I heard about the proposition was from my father at the ranch at which time he said something about Mr. Coon wanting to sell his interest to us boys and what we thought about it. I don't recall just when the conversation about organizing a partnership between us four boys and my father occurred; I know we discussed the matter

providing we bought these cattle, we'd go into such a partnership. This discussion was all the same day.

With respect to the questions on cross examination concerning the Brafords, my brothers and I sold these Brafords to Mr. East; Mr. Coon did not sell them. We got the difference between the price we agreed to pay for them at the time we bought them and the price that we sold them for to Mr. East. My brothers and I made approximately $5.00 per head on this transaction.

In his Will, Mr. Coon remembered my sister and I think Jack and Gene. Mr Coon did not remember either Richard or me in his Will. He helped me to go through college; as I recall, he helped Richard go through college but I wouldn't say.

Examination by the Court.

During 1940 and 1941, my father was out at the ranch perhaps once a month or so; during those years, he was living in Dalhart. We have an office in Dalhart and he would contact buyers, friends of his, and he would handle contracts for the sale of cattle and at the same time, he took care of the office and borrowing money from our finance company. He had no additional cattle or additional ranches that he was looking after. At the time this herd was purchased and the partnership was formed, this herd and the Braford herd did not comprise all of the cattle of Coon and Culbertson which they had owned before that: we took only a part. We took around 1,400 head of breeding cows, a number of herd sires, horses and such like. We took those over with the first note. During that time, Coon and Culbertson liquidated quite a number of cattle; I recall a thousand cows went to one person and there were some heifer yearlings and odds and ends. At one stage in the history of this matter, they had about 5,000 head. With reference to the time my

brothers and I took over this herd, Coon and Culbertson had sold most of what they had prior to the time of our purchase; we had not intended to buy the cattle they did not liquidate. After the partnership took over the 1,400 head and some other extras, my father didn't have any other cattle left other than these we liquidated.

Mr. Coon had helped me and my older brother but he died before my two younger brothers went to college and he left in his Will money to cover part of their schooling.

The note was credited with $30,000 which is one-half of the $60,000 borrowed from Mr. Wright at the National Finance. He was the witness on the stand here. The partnership of which I was a part, borrowed that $60,000; I did not sign anything in the bororwing of that $60,000, nor so far as I know did my brothers; my dad took care of that. That left the partnership owing Mr. Wright's company $60,000, of which the four boys paid off $30,000. That $30,000, the boys' part, which we owed Mr. Wright's company has been paid since then; I couldn't say exactly how long after the loan it was paid. The way we handled that account, we kept an open account at all times and borrow and pay off part. The partnership still owes them money. The $30,000 has been paid, however; it was paid by the partnership, by proceeds from the ranch.

I testified something about my father feeling unable to send me to college; with respect to his financial condition later on, I might clarify that by going into detail; the years '34 and '35, I think, were pretty hard years in the cow business. Uncle Dick was financially able to maintain any sizeable herd, but my dad was a partner only in the cattle. Uncle Dick had quite a number of other interests. Coon and Culbertson had borrowed quite a lot of money and, of course, were paying it back as the proceeds would allow. It's always been a policy of my dad, being very conservative, not to go in personal debt and until the disbursement of the balance of the herd or the liquidation,

he was not what you might say financially strong. He owned an equity in the cattle, a half interest in the cattle, but as far as owning any capital or ready cash, he didn't. He kept all of it in the herd. Independently of the money matter involved, he was not opposed to the idea of my going to college; he was in favor of it but he thought probably I should make a little money and put myself through school.

Re-Cross Examination.

I don't know the date this $30,000 was paid off; we kept an account; we'd pay off in the fall when we made calf deliveries. My father took care of the financial end. As I recall, Richard was not at home at the time the alleged partnership was created in 1939; I think he was at A. & M. at the time. He was notified, I presume, through my dad; he was asked about it. I couldn't say for sure when he signed the note; our bookkeeper W. R. Robinson, took care of that for us.

Re-Direct Examination.

It is the practice of the partnership never to pay all of the National Finance loans off; we pay them down to about $500, but we never pay that $500 because we want to keep our books open so that we won't establish a new line of credit. As I recall, we have several times paid all our debts down to $500, after the $60,000 was borrowed in 1940 by the partnership.

146 WILLIAM O. CULBERTSON, called at a witness on behalf of himself, being first duly sworn, testified, as follows:

My name is William O. Culbertson. I first made my offer to Uncle Dick Coon to purchase his interest in the foundation herd sometime in October '39. I think it was sometime in the morning when we were visiting in the lobby of the DeSoto Hotel. I told him we'd liquidated down to the best part of the cattle and I'd like to buy them. I made him a price of around $65 for the cows. I have tried to figure the exact amount but as best as I can figure it it was around that. Uncle Dick visited a little while and walked away and sometime a little later in the day come back to me and said, "Bill, come down to the office tonight and I'll talk over with you about the cattle"—buying those cattle I was interested in. He meant the Coon and Culbertson office. I went down there that night. Uncle Dick Coon, H. Coon, Mr. Walter Williams, were there.

"Q. Tell the Court in your own words what happened there that night?

"A. Well, we done a lot of visiting, talking about the herd and the hardships and hazards we'd went through and the general conversation about what had happened to us and we'd done a very good job getting through. Had dry weather and shipped hay in to feed the cattle and it was pretty tough.

"Mr. Coon happened to be able to take care of finances through his credit and we didn't go broke as usually some people did in them years, but we had a general discussion about that and he told me during that night, he brought that up about the cattle and he says he had a desire to see this herd go on, it was a herd of cattle it takes years to develop and he says, 'Developing a good

herd of cattle is a lifetime job.' He had made that remark a lot of times, and he had a desire to see the herd go on.

"He says, 'I will sell you my interest in the herd if you will in turn sell it to your four boys at the price you are paying for it' and this was the price that I had mentioned."

I went on and traded with him and I let the boys have his interest in the cattle. I'll give you a little more story there. When we started to fix up the bill of sale, H. Coon suggested that I buy the cattle negotiated for from Coon and Culbertson and let Coon and Culbertson give me a bill of sale for them, and then he suggested that, "you in turn can bill of sale a one-half interest to your four boys." I don't understand what you mean by the connection, according to what Uncle Dick says, between his desire that the herd be carried on and the sale to the four boys. I can tell you what went on and what we done.

When Uncle Dick made his proposition, I told him I'd see the boys and we'd go into it. I was sure the boys was very muchly interested. I later saw the boys when I went to the ranch. Richard wasn't there but I think maybe Gene and Jack were there; W. O. Jr. was there. I talked to W. O. Jr. first. We talked a little bit and then I told him, "Well, son, Mr. Coon wants to sell his interest in the cattle to you four boys and I want to talk it over." The price was mentioned. W. O. was very much enthused over it and very favorable to it. The question of the boys financing their end of the deal was brought up and I told them I'd finance the deal. I suppose they inquired about financing. I know I talked to Joe Jack and Gene about this while I was at the ranch; they thought it was mighty nice they could buy the cattle at the price. While I was out at the ranch on that trip, the boys and I discussed the formation of a partnership.

We talked different names for the company—Culbertson Cattle Company—and W. O. suggested Land and Cattle Company but we didn't own any partnership land and we dropped that idea. We have a neighbor, W. T. Mitchell and Sons; and we knew of other cattle companies which had the word sons in it and we finally decided to call the partnership W. O. Culbertson and Sons, at the suggestion of the boys.

"Q. Was there any discussion on that trip out to the ranch as to how profit or losses of the partnership would be divided?

"A. Equally as to the ownership."

I am familiar with Petitioner's Exhibit No. 1—the bill of sale from Coon and Culbertson to me describing certain cattle; I first saw that bill of sale when we made it up and signed it. The bill of sale is not dated but I have a way of fixing the date upon which it was executed. It was the same time I wrote the check to pay for the cattle in this bill of sale. I wrote a check to Coon and Culbertson at the time the bill of sale was delivered to me, in the amount of $99,440. That is my signature on this check you hand me.

There was offered and received in evidence a check reading,

"Dalhart, Texas, November 4, 1939. First National Bank of Dalhart. Pay to Coon and Culbertson's order $99,440, exactly $99,440 no cents. Signed W. O. Culbertson."

After I received the bill of sale from Coon and Culbertson, I executed and delivered to the boys a bill of sale. I have seen Petitioner's Exhibit No. 2, a bill of sale; it is signed by me and Gladys Culbertson, my wife. In

my practice I normally had my wife sign everything I signed. That bill of sale was delivered to the boys. The bill of sale was turned over to W. O. Jr. and, with the exception of Richard, the other boys were present. I don't know whether Richard saw it but I suppose he has. The boys later gave me a note in the amount of one-half of the cost of the cattle from Coon and Culbertson to me, one-half of $99,440. The interest rate was for four percent and for one year. Each of the boys signed that note. That note was later destroyed when we renewed it with another note. This document you hand me, Petitioner's Exhibit No. 6, is a note signed by the four boys on January 1, payable to W. O. and Gladys Culbertson in the amount of $57,000 ~~odd~~ dollars. The reason for the change in the amount of the note was, when we first made the deal with Mr. Coon there were things—a truck, pick-ups, feed, salt, saddle horses, milk cows, work horses, cooking utensils, things that belong to the ranch that wasn't included in the deal and no price made on it; it was put into the partnership, and the difference between forty-nine and fifty-seven was the boys' half. There was some other consideration put in there, but I just can't recall it.

At the time me and my wife delivered the bill of sale to the four boys, to W. O. Jr., the only condition attached to the delivery of that bill of sale was the note. I don't reckon there was any talk about who would control the partnership. I don't recall the conversation or know whether it come up at the time I delivered the bill of sale to W. O.

After my discussion with the boys and the delivery of the bill of sale, we went right ahead transferring the title from Coon and Culbertson to W. O. Culbertson and Sons of all certificates of registration issued by the Hereford Breeders Association of Kansas City; in order to do that, we had to have a transfer of the Coon and Culbertson membership to W. O. Culbertson and Sons and this is the

membership we had transferred effective November 13, 1939. This membership or certificate, I refer to, is this certificate for one share of stock in the American Hereford Association, in a picture frame.

The document referred to was marked Petitioner's Exhibit No. 7 and was offered and admitted in evidence.

This certificate is dated November 13, 1939.

"The Court:

"Let the record show that this exhibit bears the number 6147, apparently the certificate number, of one share of stock in the American Hereford Association."

This certificate, Petitioner's Exhibit No. 7, constitutes the evidence sent me by the American Hereford Association of our membership therein and our right to register Herefords; under the membership they have an extra cost on work they do in the office if you are not a member. We'd rather be under the membership if we have papers transferred or send in applications for registering of calves.

After the formation of the partnership of W. O. Culbertson and Sons, we had stationery printed in 1939. This sheet of paper which has been identified as Petitioner's Exhibit No. 8 is our letterhead.

Petitioner's Exhibit No. 8 was offered and admitted in evidence.

During 1940 and 1941, W. O. Jr. was in charge of the ranch and the cattle we acquired from Coon and Culbertson up to the time he went into the Army. I just can't recall approximately how many times I was out to the ranch in 1940 and 1941. I would say frequently. During

those years there were never any objections put to the boys' right to check on the partnership's bank account. W. O. testified about the agreement the boys had to draw whatever amount of money they needed; they kind of had an agreement about drawing so much money along. It was talked over and I was in the conversation. I never put any restrictions, myself, on the amount of money the boys could draw; they talked it over and fixed it. I never endeavored to tell W. O. Jr. how this ranch should be run; we'd have a general conversation about how things were running along. In 1940 and 1941 I got to where I couldn't ride; I was not like I had been in my earlier days; my hip was broken and it hurt me to ride a little.

With reference to how the $57,000 odd dollar note was paid off, I don't know whether I filed a gift tax returns or not. I'd have to leave that to records. If the retained copies of my gift tax returns show that I filed them, I'd say that I did. With reference to whether I have ever filed income tax returns or not, I have it made up; they make it up from the books. Different fellows in different years make up my income tax returns. Personally, I have never made up a tax return of any kind; I don't know how to. I have never investigated any one of my own returns. The usual course I follow about tax returns is, we have our books and everything goes to the books, any money we get goes to the books and it is made up from the books. To go way back, we had Mr. Cole make income tax returns then I got Mr. Coon in Amarillo for one or two years, but not long. After they complete a return and hand it to me, I never check it. I generally go into a little conversation, ask if that is as little as they can make it, I don't want to be out any more money—and if they say that is the best we can do, I generally have a conversation of that kind. Then I sign and pay it.

This gift tax return for the year 1942 indicates W. O. Culbertson, Dalhart, it is a blank copy and I don't know whether I filed that gift tax return or not.

"Mr. Bird:

That isn't a blank copy; I might say it has figures attached to it. Do your files happen to reflect whether Mr. Culbertson did file tax returns for those years, Mr. Kelley.

"The Court:

"Does the government make any contention that Mr. Culbertson did not file gift tax returns for the year '40 and '41.

"Mr. Kelley:

"Your Honor, it's a matter I haven't looked into. I don't know."

I believe I went up to the eighth grade in school; after I got out of the eighth grade, I worked on cow ranches. Other than signing the returns I have mentioned and this particular case, I haven't had any tax experience at all.

In my proposal to purchase from Mr. Coon and in the sale of a half interest to the four boys, and in the organization of W. O. Culbertson and Sons, income taxes did not have any part or bearing or play any part at all. Taxes were not mentioned. Taxes didn't have nothing to do with it. It didn't ever occur to me that taxes might be important; it was never mentioned.

All of the four boys are of age now; they have never attempted to repudiate this partnership or say that it was not a good one, in any way. The signature on Petitioner's Exhibit No. 5, dated December 8, 1939, which document you hand to me, is signed by W. O. Culbertson and Gladys Culbertson; these are the signatures of myself and my wife.

Petitioner's Exhibit No. 5 is the document that was prepared by my attorney, at my request; I asked my attorney to prepare a document.

"Q. Tell the Court where the idea of such a document originated and any conversations you might have had and how you happened to have that document prepared? Tell it in your own language.

"A. I had a conversation with Mr. Wright who testified yesterday in regards to establishing the financial, and told him of our new company that we just set up and explained to him that Mr. Coon had sold his interest in the Coon and Culbertson, interest in the Coon and Culbertson cattles to W. O. Culbertson and Sons, and we had set up a new partnership, and we'd like to open up a credit with him, because we have to finance, to go on with the ranch.

"After our conversation, I told him of the boys age, two of them were under age, wasn't of age and he said that in order for him to pass a loan with his company, for me to have my attoney to draw some kind of document whereby his attorney for the finance company would accept it.

"Q. Do you recall approximately the time of that conversation, Mr. Culbertson, with Mr. Wright?

"A. Well, I'd say it was in November. That is a guess.

"Q. Do you recall where it occurred—November what year, pardon me?

"A. '39."

I know we had the conversation, but I don't recall the dates; the conversation occurred in Fort Worth.

"Q. What did you do with respect to his suggestion?

"A. I went home and told my attorney. Well, I explained to him about our partnership in detail and told

him we was going to establish a line of credit for it and for the reason that two of the boys were under age, that Mr. Wright, the head of the finance company, suggested that I have a document drawed whereby I could sign mortgages and borrow money and a document their attorney would accep'

"Q. Who was your lawyer?

"A. M. Stalloup.

"Q. Mr. Culbertson, did you instruct Mr. Stallcup as to any of the terms he should put in the document?

"A. I did not.

"Q. This document says 'Whereas the undersigned, W. O. Culbertson and Gladys Culbertson, husband and wife, are the owners of certain livestock land leases, ranch equipment and supplies located in Hardin County, New Mexico, desiring to make provisions for the welfare of our sons, W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson, and Eugene Culbertson, and desiring to establish them in business as and when they arrive at a proper age to engage in business"—did you mention any of that to Mr. Stallcup?

"A. I did not.

"Q. (Reading) 'And further desiring to induce our said sons after they reach such state of maturity to contribute their time and services in building up and establishing a common family estate'—did you mention anything about a family estate?

"A. I did not.

"Q. (Reading) 'And desiring to suitably reward them for their assistance to us in so doing'—did you tell him you wanted to give them anything—the boys anything?

"A. I didn't tell him anything about giving anything, no.

"Q. Did you tell him that you and your wife were to have sole and exclusive right and control and management of the partnership?

"A. No, I did not.

"Q. Or the partnership properties?

"A. I did not.

"Q. Did you tell him what you wanted to have happen in the event one of these boys died?

"A. I did not.

"Q. After the document was prepared, Mr. Culbertson, did you read it?

"A. Mr. Stallcup read it to me.

"Q. Did you question him about its terms?

"A. I asked him, I says, 'I reckon that will be acceptable to the National Finance people?

"Q. Do you recall what his reply was?

"A. He said it should.

"Q. Did you sign the instrument?

"A. I did.

"Q. What is your practice in dealing with your attorney, Mr. Culbertson?

"A. When dealing with him, I do what he tells me to do."

With respect to the question whether I claim that my daughter, Fannie, is a member of this partnership for the year 1941, you (Mr. Bird) told me she wasn't. The question whether I am claiming her as a partner for the year 1941 is not in this case, but I claim she is a partner.

In executing this document of December 8, 1939, I did not intend to qualify or change anything that had theretofore existed between me and my sons. I did not intend to change their ownership of the cattle. I didn't realize that the signing of this document of December 8 might tend to change the partnership or give me any trouble when I signed it. I signed that instrument for the purpose of establishing a credit under the advice of Mr. Wright who is the Head of the credit company. After it was signed, I sent the original to Mr. Wright. It was

never filed of record. I did not make any other use of this instrument. Later, when I decided to take my daughter, Fannie, into the partnership it was used. I told Mr. Stallcup about taking Fannie into the partnership as one of the partners and he wrote another one for her for the same purpose that this was for. Fannie was a minor at that time. With respect to when W. O. Jr. and the other three boys first knew about this document of December 8, 1939, I wrote W .O. Jr. in regards to having wrote it; I explained why a document—as I have explained here and there was some—I don't know just how to put that word—criticism as to regard of it affecting their ownership. I don't know who was criticizing it—I believe the Government; that is the way I put it. The individual that was doing it, sets right there, Mr. Jordan (pointing to Internal Revenue Agent Jordan). In writing to W. O. Jr. I told him I thought we'd better confirm his, the boys' ownerships through the Courts. The first time I knew that this document of December 8, 1939 would effect or might affect the partnership of W. O. Culbertson and Sons was after my conversation with Mr. Jordan here. With respect to the questions Mr. Jordan raised, I came to Fort Worth to see Mr. Wright and we talked it over and he suggested I get an accountant and he suggested Mr. Y. D. Harrison and called him up and he came over to the office and we went into it. I employed Mr. Harrison at that time. Mr. Harrison advised me that he would take care of the case and take it up with them. So far as I know, he did.

With respect to my writing W. O. suggeting that some state Court proceeding be brought to determine whether the partnership was good, Mr. Harrison, I believe, put that proposition up. I don't recall what he said about it. At about the time I advised W. O. of the document of December 8 and of Mr. Harrison's suggestion, the other three boys were around and I talked it over with them. I don't

recall the dates but I have been connected with them in conversation at times. I believe Richard went to the Army when he got out of A. & M. With respect to whether I advised either of the boys of the existence of this December 8 document prior to the time I wrote W. O. Jr. about it, I might have mentioned it but I couldn't say. I expect I mentioned it about that time. I didn't mention the document to any of them until after this little trouble come up, that is, after my conversation with Mr. Jordan. After writing W. O. and hearing from him, I employed Mr. Stallcup, the attorney, and told him this thing came up and there was some opinion as to the title of the boys property involved and I'd like to confirm it through the Courts. I am not right sure but I think maybe he wrote Mr. Harrison. Later we had a trial of that case. Three or four was present. I was there; none of the boys were there; Mr. Stallcup was there. My wife and daughter wasn't there. After the trial the state Court rendered a judgment. I suppose this document, identified as Petitioners Exhibit No. 9, is the judgment which the District Court of Dallam County rendered in the case of W. O. Culbertson, Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson versus W. O. Culbertson and wife; ye; that is the judge's name.

The said judgment, being Petitioner's Exhibit No. 9, was offered and admitted in evidence.

Cross Examination.

At the time we undertook to establish this partnership between me and my boys in November, 1939, I did not file a certificate in the Probate Judge's office in Dallam County or any other county showing that we had created such a partnership and were operating under the name

of W. O. Culbertson and Sons; I did not know that statutes of the State of Texas require such a filing when such a partnership is formed. With respect to the time I talked to W. O. Jr. and the other two boys out on the ranch about the creation of the partnership, I testified I stated, "I will finance the deal", after they told me they didn't know how they would be able to pay for the cattle; that come up in the conversation between us in regards to financing it. They gave me a note for these cattle. Later down the line I made them gifts in payment; I didn't pay it all off but did pay a considerable portion of it—all but the $30,000.00 which was borrowed, and a credit by an error that was made in the first place. I borrowed the money for the partnership. At the time the boys gave me this note, it was due and payable one year after date. With respect to whether I felt the boys would be able to pay it off in a year, I didn't give it much thought at all; I just told them we'd make the note for a year. I made them that proposition—finance it in one year. I didn't intend for these to be gifts to the children; I never gave it any thought at the time.

I testified I gave the bill of sale to W. O. Jr.; I couldn't tell you whether the other boys saw it or not. In 1940 and '41 W. O. Jr. was foreman at the ranch; he was general manager; I more or less looked after the business end around the office in Dalhart and out buying cattle or selling cattle. I bought some cattle and W. O. went with me, I will say that.

I don't think W. O. ever wrote a check for cattle bought in 1940 and 1941 nor did the other three boys that I know of.

I testified that Petitioner's Exhibit No. 5, the document of December 8, 1939, was prepared at the suggestion of Mr. Wright, Manager of the Finance Company from whom I expected to establish a line of credit.

"Q. Now, what did he tell you when you talked to him about reducing this to writing?

"A. Reducing what to writing?

"Q. The partnership agreement?

"A. I don't believe he put it that way.

"Q. How did he put it?

"A. He told me there was two of the boys in the partnership that were minors and he would extend a loan, be glad to, if I'd have my attorney draw a document giving me the power to sign notes or mortgages, that their attorney would accept, then he would take care of my loan for finance."

I testified in the District Court case in Dalam County; in that case, I was asked a similar question. With respect to whether I remember testifying, "Yes, I talked to Mr. Wright about it. He said, 'You better get your partnership business in a form of writing whereby you will have the right to go on and borrow money'," it don't sound like it. I testified to that effect.

That is my signature on what purports to be a protest filed by me with the Internal Revenue Agent in Charge with respect to the tax liability in this case. In that I stated "this is in regrad to Mr. Wright's conversation. Mr. Culbertson explained that he and his four sons were operating a cattle business in partners under an oral agreement whereupon Mr. Wright advised that before his loan company would make a loan to W. O. Culbertson and Sons, the partnership agreement would have to be reduced to writing." If it says so there, I swore to that statement before Miss Marie A. Mitchell. It wasn't my understanding that the effect or intention of this was to reduce our partnetrship agreement to writing. I do say that in November, 1939, I sold a half interest to my boys. I read or Mr. Stallcup read to me the document of December 8 which he prepared for me and which I

signed. If I sold a half interest in the stock in November 1939, then with respect to what I meant by the following statement,

"Whereas, the undersigned, W. O. Culbertson and Gladys Culbertson, husband and wife, are the owners of certain livestock leases, land leases and ranch equipment and supplies located in Hardin County, New Mexico—"

Mr. Stallcup wrote that up the way he wanted it for certain purposes and I signed it. It's an error on my part if I didn't call his attention to the fact that I only owned a half interest. The explanation of the following language,

"desiring to make provisions for the welfare of our sons, W. O. Culbertson—naming them—and desiring to establish them in business as and when they arrive at a proper age to engage in business, and further desiring to induce our said sons after they reach a state of maturity to contribute their time and services in building up and establishing a common family estate, and desiring to suitably reward them for their assistance to us in so doing, and in order to establish with them a limited partnership in a ranching enterprise to be known as W. O. Culbertson and ons"—

I told you that wasn't wrote under my suggestion. I think he copies that document from a law firm out of Houston. I can prove that. He read it to me and I signed it. Reading further,

"Wherefore, know all men by these presents, that we, W. O. Culbertson and Gladys Culbertson, for and in consideration of the sum of ten dollars to us paid and other good and valuable consideration, do hereby and by these

presents sell, and convey unto W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson, and Eugene Culbertson, and to each an undivided one-eighth interest in and to the following described property, to-wit:

"About 1400 cows, 35 head of bulls, 50 head of calves, 30 head of horses, together with all ranch equipment leasehold estate and any and all other property located in the Hardin—on the Hardin County, New Mexico ranch, including property acquired from R. S. Coon as of November 1, 1939."

I signed that but not for the purpose of their title, for the other. Mr. Stallcup read to me the following,

"This conveyance is made subject to the following conditions and stipulations, to-wit:

"1. The grantors, W. O. Culbertson and Gladys Culbertson reserve to themselves the sole and exclusive right and control and management of such properties herein conveyed with increases thereof until the time that the youngest of our said sons living shall have arrived at the age of twenty-one years."

With respect to whether I made any object to that statement, I said, "I guess it will fill the purposes wrote for." With respect to the statement,

"In fact, to manage and control the property herein conveyed without restrictions and in such manner as may by them be deemed proper, until the youngest surviving son shall have arrived at the age of twenty-one years and until such time, it shall not be necessary to obtain the verbal or written consent of either of said sons or of any instrument in writing—from either of said sons to any transactions desired to be done on the premises by the grantors herein."

We never exercised our rights to that at all; I signed the document for other purposes than that. I signed this document without ever inquiring of my sons whether they would agree to it. The document further provides,

"It is further made a condition of this conveyance that neither of our said sons shall have the right of withdrawal of any part of his interest in such ranch enterprise or of sale until the youngest surviving son shall have reached the age of twenty-one years, but at such time either one or all of said sons shall have the right to withdraw and shall be entitled to receive his interest therein, but his interest shall be equal to an undivided one-eighth in value or property in kind of—after all liabilities, if any, have been liquidated.

"In tetstimony whereof, witness our hands at Dalhart, Texas, this the 8th day of December, A. D. 1939, but to become effective on the 1st day of January 1940.

I don't know why I put that statement in there if a partnership was created in 1939.

On December 31, 1941, I undertook to bring Fannie in as a partner; I sold her a one-eighth interest in the partnership out of my part. This is my signature on this photostat, which I suppose is a photostat of the original which I signed. This is the document whereby Mrs. Culbertson and I gave Fannie a one-eighth divested interest. With respect to what I meant by the provision in the first paragraph reciting the execution of the document of December 8, 1939, and

"Whereas, said trust instrument and the partnership thereby created is now in full force and effect."

Mr. Stallcup wrote the document and read it to me. I understood what it was for and I signed it for the same

purpose. I say I signed the one of December 8, 1939 for the purpose of using it to establish a line of credit; I signed this one for the same reason, so that if they'd called on me for it, I would have had it set up. If the loan company had called on me for a document, because she is in the partnership, I'd have it to help my credit. Fannie gave me a note for whatever the record says. The figure is $13,488.27. With respect to how old Fannie then was, she was born in 1926. With respect to Fannie paying that note off, probably further down the line she helped to pay it off; I don't know; I might have given her the entire amount.

Over objection of the attorney for petitioner, Respondent's Exhibit No. A, being the conveyance from W. O. Culbertson and wife to Fannie Culbertson, was admitted in evidence. The objection was that, there being no claim that Fannie is a member of the partnership for tax purposes, the document was immaterial.

I testified this morning that Mr. Bird advised me not to claim Fannie as a partner; I personally think she is a partner.

I can't recall when I received the notice of deficiency in this case; if you state it was mailed to me on December 17, 1943, I'd have to go over the record because I can't remember good. Following the receipt of that deficiency notice, I talked to Mr. Stallcup about the petition which was later filed in the District Court of Dallam County. I talked to him some time or another about it with regard to the ownership of the boys in the Court. I got Mr. Stallcup to file that petition as counsel. I suppose I paid him a fee for it. He filed a petition on behalf of the four boys and my daughter. If that is what it says, I guess it is correct to say that the petition was filed in the District Court of Dallam County on Febru-

ary 23, 1944; I guess that on February 26, three days later, me and Mrs. Culbertson filed an answer to that petition. Mr. Stallcup, the judge and Court reporter were in the Court room. I don't suppose there was anybody but me and Mr. Stallcup, outside of the officials of the Court. The reason of that is they called a special time to go through the procedure. I suppose I was called as a witness for the boys.

The petition filed in that Court, together with the Respondent's answer, were admitted in evidence as Respondent's Exhibit B.

A certified copy of the transcript of the evidence of that case was admitted in evidence as Respondent's Exhibit C. In reply to the suggestion of counsel that it might be possible to select particular parts of the transcript of evidence, the Court suggested that parts of such record could be later omitted by stipulation.

I am not very familiar with the books of the partnership; I don't pay any attention to them; there might be some item I could remember. I don't understand how to keep books. I couldn't tell you whether there is any capital account set up here on behalf of the partnership members or not.

I signed this document you hand me, the partnership return of W. O. Culbertson and Sons, for the year 1940; in that return the date of organization of the partnership is stated to be January 1, 1940. In making up our report, we didn't make any report until the first of January, 1940. There was no income made and we didn't make any.

Respondent's Exhibit D, being the partnership income tax return of W. O. Culbertson and Sons for the year 1940 was admitted in evidence.

In 1941 the partnership made a similar return of income in which the five children and me were listed as partners. If she is in there, that is the year after I brought Fannie in as a partner. If it states that the date of organization of the partnership is January 1, 1941, all I can lay that up to is the man who made my report, made it wrong. I signed it but he made it wrong.

The partnership income tax return for 1941 was admitted in evidence as Respondent's Exhibit E.

Attached to the 1940 return as certain schedules on letterheads of W. O. Culbertson and Sons. That letterhead shows W. O. Culbertson and the four sons, W. O. Jr., Richard, Joe Jack and Eugene. Certain schedules were prepared on letterheads of W. O. Culbertson and Sons, with the names W. O. Culbertson, Sr., Gladys Culbertson, W. O. Jr., Richard, Joe Jack, Eugene and Fannie Culbertson thereon. By the statement appearing under each of the names, "All equal owners in W. O. Culbertson and Sons", I meant myself and my wife are one part. That is what I am telling you now. A letter dated April 23, 1946 written by Marie A. Mitchell to Mr. William G. Cullen, Head of the Southwestern Division of the Technical Staff, on the letterhead of W. O. Culbertson and Sons, has this, "W. O. Culbertson, Sr. and Gladys Culbertson" followed by the names of each of the children and then the statement, "All one-sixth owners in W. O. Culbertson and Sons.". I didn't sign that but that is our letterhead. I use such letterheads like anybody else uses letterheads, for the same purposes. We had three different sets of partners for different years.

Over objection of petitioner that the offered letter, being dated in 1946, had no bearing on the issue, there was received in evidence as Respondent's Exhibit F, a

photostatic copy of the letter referred to, for the purpose of showing the names appearing at the top of the letterhead; the letter was allowed in evidence to show the letterhead and not the contents of the letter. In a discussion between counsel for petitioner and for Respondent, and the Court, counsel for petitioner made the statement that it is the petitioner's claim in this case that only the following persons were members of the partnership of W. O. Culbertson and Sons during the tax years 1940 and 1941: W. O. Culbertson, W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson; that petitioner does not claim that Fannie was such a partner for tax purposes.

Not all of the boys are rendering services out on the ranch at the present time; W. O. is and Richard has some lately, but they were all out there some time back and worked on the ranch. In this year they was out there. I believe that in 1940 and 1941, all of the boys were in school except W. O. Jr.; two were in high school and one in college. When they weren't in school, they was right on the ranch working.

Re-Direct Examination.

I don't understand your question as to whether I ever heard of one man forming a partnership with himself. I have heard of a partnership between various individuals when some of the individuals didn't have a written agreement.

During the years 1940 and 1941 neither W. O. Jr., Richard, Joe Jack or Eugene knew of the document of December 8, 1939. At the time I sold an interest to Fannie, she was a minor. That was the reason the instrument of December 31, 1940 was drawn by Stallcup—because she was a minor. That was the reason the original docu-

ment of December 8, 1939—because two were minors. I didn't know whether the statutes of the State of Texas require that a certificate of partnership be filed in the county records in order to make the partnership valid; I don't know it now.

During the tax years involved, aside from my interest in W. O. Culbertson and Sons, the partnership, I owned a home in Dalhart and my wife and I personally owned a little ranch of about 10,000 acres, of which one-half was deed land and one-half we leased, of it we owned about 5,000 acres and leased 5,000. As I recall my income from that little ranch was about $1,600 per year.

Re-Cross Examination.

I stated this morning that I purchased those cattle from Coon and Culbertson for a price averaging about $65 a head, with the exception of some bulls and herd sires. I couldn't tell you whether the value of those cattle increased any in 1939. I might have inventoried them for income tax purposes in the following year at $60 per head; I don't know—the records are the best evidence. That is my signature on this letter to Mr. Jordan, Internal Revenue Agent. This letter of June 24th requests copy of cattle inventory in detail as of December 31, 1940; at the bottom, it says, "average price $60 per head, $131,460". That is what I inventoried them at. With respect to whether under that theory, I didn't buy these cattle at any particular bargain price from Mr. Coon, you have my evidence here. I stated it was a bargain price but it says here I inventoried them at $5 a head less than I paid for them, the following year. The reason I didn't tell the boys about the document of December 8th that me and Mrs. Culbertson signed is that I didn't think they'd be concerned in it. While I testified that I drew it up for the purpose of establishing a line of credit for

them, I didn't think they would be interested in knowing about that. With respect to your question, "You didn't want them to know that you still controlled and managed these cattle?", I answered you.

Re-Direct Examination.

My last answer was that I didn't think they'd be concerned in this document. With respect to whether I had sole control of these cattle, I had a right with the National Finance to sign mortgages or notes for expense money. The boys and I had agreed I'd handle the finances. The purpose of this document was to be a means whereby I was to borrow money for the partnership to run on; the document was not signed for any other purpose. That is the reason I thought the boys were not concerned with this document. I have already testified that I didn't think this document affected the boys or the partnership in any way.

Re-Cross Examination.

I have not told Mr. Wright that I believed that document to be null and void, at any time since I filed that document with the National Finance Credit Corporation. I haven't told Mr. Wright anything about filing the petition in the District Court of Dallam County to declare it null and void.

Re-Direct Examination.

As I have testified, the first time I knew the document of December 8, 1939 had any bearing at all on the partnership was when Mr. Jordan, the Internal Revenue Agent, told me that it did. I testified that shortly thereafter I came to Fort Worth and consulted Mr. Wright

about it, and that Mr. Wright asked me to get Mr. Harrison; they talked about it a little while and Mr. Wright and one of his helpers called him in the office. In my discussions with Mr. Wright or in discussions in which he was present, the question of whether the December 8, 1939 document was valid was not discussed. I remember that on the day you (Mr. Bird) and I talked to Mr. Wright about the validity of the instrument, we discussed whether it was good or worthless; we said it wasn't worth anything and didn't have no effect in the partnership whatever. I don't remember whether I at any time told Mr. Wright I thought the document was not worth anything; I hadn't up to that time.

Examination by the Court.

$60,000 was borrowed of which $30,000 would be the portion of the debt allocable to the boys—one-half. That $30,000 was paid off through the selling of the cattle and sending the money to the loan company; through the sales of cattle off the ranch, that the boys owned an interest in. Personally, I did not directly or indirectly make the boys a gift of any part of that $30,000; it was paid out of partnership assets.

The boys worked on the ranch which was ninety-three miles from Dalhart. This ranch was located at Bueyeros, New Mexico.

"Q. Now, during the years 1940 and '41, Mr. Culbertson, who determined the policies of the partnership, that is, the policies as to when to buy cattle and when to sell, when it was wise to sell; who determined that?

"A. Well, in conversations with myself and my boys, we'd decide on doing something, as we do now.

"Q. Did you rely upon the boys' ideas in that regard or use your own judgment?

"A. I relied upon the boys if they didn't want to do anything, I wouldn't do it at all."

Stallcup's fees for handling the suit in the District Court of Dallam County were paid by the partnership; any counsel of that kind is always paid out of the partnership if it is pertaining to a partnership matter.

The boys worked out on the ranch various times on the summers when they were in school and W. O. worked there both before and after he got out of college. The boys drew salaries when they worked steady. When they worked only two or three days at a time, they didn't make any charge. If they were out there any time, they drawed a salary for it. They done lots of work they didn't get anything for, just two or three days, nothing paid for it. With respect to the amount per month the different boys were paid when they were working there for considerable lengths of time, I noticed somewhere a record about those years; one of them was drawing $35, $40 for one, pertaining to Gene and Jack. I think Richard drawed more money and W. O. drawed $75. W. O. said he drawed $100 in '40 and '41. These were monthly salaries. I did not draw any salary and I have never drawed any salary. (Witness excused.)

"Mr. Bird:

"That is all the witnesses we have. If the Court will permit, I will make this statement. I had planned, originally, when the case came to me, to use Mr. Stallcup, the lawyer whose name you have heard mentioned here. By agreement with Mr. Kelley, we were going to take his deposition. I went to Amarillo and found out he was a man of seventy-five years old and that he was in a veteran's hospital and he had just been operated on. After talking to him, I concluded I could not sponsor him as a witness for the reason his memory was failing."

The following stipulation of fact was agreed upon:

"That so far as we have been able to find, there are no accounts set up in the books showing who owned the partnership, nor the ownership of any individual, in the partnership."

Thereupon petitioner and respondent rested.

The parties certify that the foregoing contains the substance of all the evidence given at the hearing of these proceedings.

BENJAMIN L. BIRD,
(Benjamin L. Bird)
Counsel for Petitioners.

909-913 Sinclair Building,
Fort Worth 2, Texas.

THERON L. CAUDLE, C.A.R.
(Theron L. Caudle)
Assistant Attorney General.
CHARLES OLIPHANT, C.A.R.
(Charles Oliphant)
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

The foregoing statement of the evidence is approved and ordered to be made of record in the above numbered and entitled cause this 22nd day of December, 1947.

(Sgd.) R. L. DISNEY,

Judge of The Tax Court of the United States.

originated the now internationally famous Hereford steer, a cross between Brahmas, the sacred cattle of India, and Herefords. No 1 beef cattle of the world.

Herefords have never been able to thrive in a line east of climate-wise Brahmas thrive in such a climate and so will the cross. Hereford therefore opens up these areas to grow beef production. Prize beef is said to be second only to Hereford.

Under the dissolution many cattle were sold, but Culbertson & Sons, the name under which Culbertson and his boys will operate, have title to the pick of the entire herd of Coon & Culbertson breeders.

In addition said Culbertson yesterday, "we have 6 topflight selected sires, including the two outstanding bulls, the $2500 Jay Hawkeye Domino and The Real Prince Domino 100th."

Culbertson & Sons said Culbertson will continue to raise registered Domino Herefords, the cattle that made Coon & Culbertson internationally famous. Their range will be in Eastern New Mexico with headquarters near Bueyeros in Harding county.

Probably said Coon yesterday, an arrangement will be worked out under which both Coon and Culbertson will maintain joint offices in Dalhart.

Coon & Culbertson were proud of the fact that 75 per cent of their business was made up of repeat orders. In recent years they have sold upward of 1,000 registered Domino Hereford bulls annually. Biggest shipment of bulls at one time was 300 to the Palomas Land & Cattle Co., which has its range in New Mexico but its offices at Columbus, N. M. This was also the largest international shipment of registered bulls ever made by any firm as far as known. As one time the Palomas firm had 3,000 Coon & Culbertson bulls in service on

[illegible] county [illegible] chairman said [illegible] final report on total membership in the county will probably be released Monday.

Under agreement with the Texas Publicity Association, the Red Cross drive ends on November 30 and the annual Christmas seal sale opens to continue through December.

Of Meter Tests

Forrest Campbell, Abilene head of a West Texas Utilities Co. meter testing crew now in this city, spoke at the Rotary Club luncheon Friday. He explained duties of the crew, methods of testing meters and other details of the work.

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USE YOUR CREDIT

THE TAX COURT OF THE U.S.
DOCKET NO.
FILED
NOV 2 1936
PETITIONER'S EXHIBIT

STATE OF TEXAS

COUNTY OF

Deed of Gift by [illegible] and [illegible]

of the County of [illegible] State of [illegible]

[illegible]

[illegible]

[

STATE OF TEXAS

COUNTY OF Dallas

Know all Men by these Presents: That W. O. Culberson & Gladys Culberson

of the County of Harding, State of New Mexico, hereinafter called Mortgagors, in consideration of the sum of

Ten & Other Obligations Dollars, to us paid by W. O. Culberson, Jr., Richard Culberson, Joe Jack Culberson, Florence Culberson

and Jack Murphy (these presents do Largaine and sell unto W. O. Culberson, Jr., Richard Culberson,

Joe Jack Culberson, Florence Culberson and W. A. Buchanan, Culberson

fully agreeing hereby, to warrant and defend the title to the same unto the said Mortgagee, their heirs and assigns forever, all of the following described personal property, to-wit:

One-Half Interest

No. Head	Class	Age	Description	Brand	Color	Location and Marks
216	cows	4-8	Registered Hereford			O-Left Jaw
62	Hfrs.	coming 2	"			
60	cows	2-8	Tura Bred			
1	Hfrs.	Calves	"			(1 Yr)
12	Bulls	2-8	Registered			
1	"	2	"			Real Prince Domino 10053
1	"	2	"			Jerkwater Domino

Cattle situated at P.O. DeBeque & Sawyer Ranches, Harding County, New Mexico

Witness our hands this 1st day of Jan. 1951

W. O. Culberson

Gladys Culberson

DISSOLUTION OF COON & CULBERTSON RANCH IS ANNOUNCED

THE TAX COURT OF THE U.S.
DOCKET
EVIDENCE
NOV 12 1946
EXHIBIT 3

Ranch Firm Was One of World's Famous Spreads

Friendly dissolution of the Coon & Culbertson ranch partnership, one of the most famous ranch firms in the world, was formally announced yesterday.

The announcement was made by H. Coon, nephew of the founder and for many years associated with the firm.

***

The Last Sale

The last Coon & Culbertson sale in Dalhart yesterday. It comprised 98 two-year-old registered Domino Hereford bulls that were sold to J. D. Cage, big cattle operator of San Antonio. "Those are as good a bulls as ever left our ranch," declared Culbertson, who showed that he felt deeply as he weighed this last material evidence of a famous partnership melting away into the past.

***

R. S. (Uncle Dick) Coon, of Dalhart and Houston, founded the ranch about 1903 with ranch headquarters about where the O. H. Ranch ranch is now in the Rehm community, 10 miles southwest of Dalhart.

Office headquarters, however, have always been in Dalhart. W. O. (Bill) Culbertson, in 1915, bought out the interest of another man, became a partner of Mr. Coon, and the Coon & Culbertson firm came into existence.

Coon was already in the registered Hereford business. The new firm continued aggressively, and became world famous before many years it annually registered more calves than any other ranch in the world, according to the American Hereford Breeders Association. Coon & Culbertson cattle ranged over 20,000 acres in seven counties.

Coon & Culbertson 11 years ago originated the now internationally famous Domino Hereford cross, a cross between Domino, the sacred bull of India, and Herefords, the best cattle of the world.

Hereford has never been able to [illegible] on the financial side of the [illegible] in such a [illegible] and the cross

their ranch.

Several times Coon & Culbertson made shipments of 200 bulls. They were proud of the fact that assets of their customers were greater than combined assets of customers of any other ranch, so far as Coon & Culbertson knew. Their customers credited Coon & Culbertson bulls and cows with helping build some of the finest Hereford herds in the nation.

Among Coon & Culbertson customers in addition to the Palomas ranch, were the Terrenos Cattle Co. of Old Mexico, one of the largest in the world; Joe Sneed of Amarillo, Dan Sullivan, Ira G. Yates, San Antonio; Pierce Estate, Pierce, Tex.; Lykes Bros., Tampa, Fla.; King ranch, Kingsville, Tex.; Moody Bros., Galveston; Benjamin Clayton, Springer, N. M.; U. S. government, buying for the Mescalero Indian reservation in New Mexico; Slaughter ranch, Lubbock; W. J. (Billy) Lewis, Clarendon Lasater ranch, Hillsboro, N. M.

SOVIET —

Continued from Page One.

million men on the Finnish border and that more men from Russia's army of 15,000,000 have been called to the fight. Biggest possible aid for Finland is 400,000.

GOVERNMENT MOVES

The Finnish government has left Helsinki, it was reported today but destination was not given.

A Swedish newspaper at Stockholm said the Russian warship damaged by the Finns has sunk.

Anti-Soviet demonstrations and riots have broken out in Sweden and Norway.

U. S. ATTITUDE

U. S.-Red relations are severely strained. Yesterday President Roosevelt appealed to Russia not to bomb Finnish civilians. Molotoff said his plea was "pointless" because Red planes had not bombed civilians and would not do so. State department men in Helsinki meanwhile reported that Red planes were continually bombing civilians there.

Senator Key Pittman (Dem., Nev.) urged U. S. recognition of Russia today suggested it be withdrawn. Senator Borah did not favor breaking relations because he could not see that it would help Finland. Also the bombings of other wise have any constructive result, he

Hospital Wants Waste Metal Tubes To Sell

Loretto Hospital asks Dalhartans to save miscellaneous metal tubes, such as those containing toothpaste, shaving creams, salves, etc., which will be sold to a lead company for funds for the Hospital office.

Mother Judith asked Dalhartans for the metal tubes about a month ago, but received no response.

The hospital needs more filing equipment for its records, and by salvaging the waste tubes, a portion of the equipment may be bought.

FSA Conference To Open Monday

Several hundred Farm Security Administration employees from a five-state region are expected to attend a four-day conference opening Monday in Amarillo.

Washington, D. C. officials scheduled to attend the session include George E. Mitchell, assistant administrator; John O. Walker, director, resettlement division; Mrs. Clara V. Thompson, home demonstration division; Dr. R. C. Williams, medical director; Dr. Carl C. Taylor, head of the division of farm population and rural welfare, B.A.E.

Red Cross Call Ends Thursday

The 1940 Red Cross roll call ended on Thursday and no more contributions for the drive will be taken, C. E. Durgin, county roll call chairman said. A final report on total membership in the county will probably be released Monday.

Under agreement with the Texas Funeralgists Association, the Red Cross drive ends on November 30 and the annual Christmas seal sale opens on December through December

Churches To Have Guest Speakers

Three Dalhart churches will have out-of-town speakers in their pulpits at Sunday services.

Dr. Frank L. Turner, president of McMurry College at Abilene, will preach at the Central Methodist church at 10:50 a. m. and at the Pine Street Methodist Church at 7:30 p. m. He is an outstanding preacher, formerly pastor of a Fort Worth church and commissioner of the Memorial hospital there.

Dr. Elburn Burrows, Ada, Okla., layman, is to speak at 7:30 p. m. services at the Baptist church. Dr. Burrows is a graduate of Oklahoma Baptist University and Baylor University, and has practiced in Ada for several years. He and Mrs. Burrows, who is a daughter of W. L. Young of this city, are en route for San Francisco, where they will sail for India to enter medical missionary work.

Hooks Rites Held In San Angelo

Funeral services for Mrs. J. W. Hooks, found dead of monoxide gas poisoning in the garage at her home Wednesday noon, were held at 2 p. m. Friday at the Robert Massie Funeral Chapel in San Angelo, where her parents, Mr. and Mrs. J. T. Scott, live. The Baptist minister officiated, and a male quartet sang funeral hymns. Burial was in the Fairmont Cemetery, directed by the Robert Massie Funeral Home and Peeples Funeral Home of this city.

Rotarians Learn Of Meter Tests

Forrest Campbell, Abilene head of a West Texas Utilities Co. meter testing department, was guest speaker at the Rotary club luncheon Friday. He explained duties of the crew, methods of testing meters and other details of the work.

CHRISTIAN SCIENCE SERVICES

"God the Only Cause and Creator" is the subject of the Lesson-Sermon which will be read in all Churches of Christ, Scientist, on Sunday, December 3.

The Golden Text is: "Let all the earth fear the Lord: let all the inhabitants of the world stand in awe of him. For he spake, and it was done; he commanded, and it stood fast." (Psalms 33:8,9).

Among the citations which comprise the Lesson-Sermon is the following from the Bible: "Let them praise the name of the Lord: for he commanded, and they were created." (Psalms 148:5)

The Lesson-Sermon also includes the following passage from the Christian Science textbook, "Science and Health with Key to the Scriptures" by Mary Baker Eddy: "God is individual, incorporeal. He is divine Principle, Love, the universal cause, the only creator, and there is no other self-existence. He is omnipresent, and is reflected by all that is real, and eternal and by nothing else. He fills all space, and it is impossible to conceive of such omnipresence and individuality except as infinite Spirit or Mind." (page 331)

Use Newspaper Advertising First!

175 PETITIONER'S EXHIBIT 4.

The Tax Court of the U. S., Div. 4, Docket 4184-5. Admitted in Evidence Nov. 12, 1946.

Coon & Culberson,
Dalhart, Texas.

October 23, 1939.

Mr. A. A. Wright,
National Finance Credit Corporation,
Fort Worth, Texas.

Dear Mr. Wright:

Mr. W. O. Culbertson and Sons will take over the Coon & Culbertson herd November 1st, 1939. Mr. R. S. Coon is selling his interest in the cattle to this new firm—W. O. Culbertson and Sons.

Mr. Culbertson would like to establish a credit with the National Finance Corporation and if this is agreeable with you we would like to have the herd inspected on the 29th of this month. We will tally the cattle over to Mr. Culbertson at the same time your representative inspects the cattle. If the above date can be set for this inspection it would accommodate us.

On behalf of Mr. Coon, I want to thank you and express our appreciation for the manner in which you handled our credit while doing business under the Coon & Culbertson name.

Kindest regards,
(Signed) W. H. COON.
(W. H. Coon)

Dalhart, Texas.

Copy.

176 PETITIONER'S EXHIBIT 5.

The Tax Court of the U. S., Div. 4, Docket 4184-5. Admitted in Evidence Nov. 12, 1946.

The State of Texas,
County of Dallam.

Whereas, the undersigned, W. O. Culbertson and Gladys Culbertson, husband and wife, are the owners of certain live stock, land leases and ranch equipments and supplies, located in Harding County, New Mexico, and,

Desiring to make provisions for the welfare of our sons, W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, and desiring to establish them in business, as and when they arrive at a proper age to engage in business; and, further, desiring to induce our said sons after they reach such state of maturity, to contribute their time and services, in building up and establishing a common family estate, and desiring to suitably reward them for their assistance to us in so doing, and in order to establish with them a limited partnership in a ranching enterprise to be hereafter known as W. O. Culbertson & Sons;

Therefore, Know All Men By These Presents, That we, W. O. Culbertson and Gladys Culbertson, for and in consideration of the sum of Ten Dollars to us paid, and other good and valuable consideration consideration, do hereby and by these presents sell and convey unto W. O. Culbertson, Jr., Richard Culbertson, Jo Jack Culbertson and Eugene Culbertson, and to each, an undivided one-eighth interest, in and to the following described property, to-wit:

About 1400 cows, 35 head of bulls, 50 head of calves, 30 head of horses, together with all ranch equipment, leasehold estates, and any and all other property located on the Harding County, New Mexico Ranch, including property acquired from R. S. Coon, as of Nov. 1st, 1939.

This conveyance is made subject to the following conditions and stipulations, to-wit:

1. The grantors, W. O. Culbertson and Gladys Culbertson, reserve to themselves, the sole and exclusive right and control and management of such properties herein conveyed, with increases thereof, until the time that the youngest of our said sons living shall have arrived at the age of twenty-one years; including the right of sale, or exchange of said property or any part thereof, and the right to purchase or lease lands for the use of the ranch enterprise, either out of earnings or of sales of property on hand; the right to purchase additional livestock; the right to borrow money on the credit of part or all of the property belonging to the ranch, and to pledge the property for security for such money so borrowed; the right to increase by purchase, or to diminish by sale, the livestock on said ranch; to sell any equipment or supplies now belonging to the ranch or to purchase other equipment and supplies; to invest the money derived from sales or from earnings of the ranch as they may deem proper; in fact, to manage and control the property herein conveyed, without restrictions and in such manner as may by them be deemed proper, until the youngest surviving son shall have arrived at the age of twenty-one years; and until such time, it shall not be necessary to obtain the verbal or written consent of either of said sons, or of any instrument in writing from either of said sons, to any transaction desired to be done in the premises, by the grantors herein.

2. It is specifically made a condition of this conveyance, that should there be at any time before the youngest surviving son shall have arrived at the age of twenty one years, any losses sustained in the operation of such ranch, or other enterprises involved, then the grantors, nor either of them, shall become personally liable to the grantees herein, or to either of them, for any part of such losses, but such losses, if any, shall be bourne by such ranch enterprise, and not by any individual owner of any interest therein.

3. It is further made a condition of this conveyance, that neither of our said sons, shall have the right of withdrawal of any part of his interest in such ranch enterprise, or of sale of same, until the youngest surviving son shall have reached the age of twenty-one years, but at such time either one, or all of such sons, shall have the right of withdrawal from such partnership and shall be entitled to receive his interest therein, but his interest shall be equal to an undivided one-eighth in value, or property in kind, after all liabilities, if any, of such ranch or other enterprise has been liquidated.

4. In the event of the death of either of our said sons, prior to such time that the youngest surviving son shall have reached the age of twenty-one years, such deceased son leaving no surviving wife or child or children born in lawful wedlock, then such interest of such deceased son shall vest in his father and mother and surviving brothers and sister, or the surviving ones, according to the rule of descent and distribution prevailing in Texas. In the event of the death of either of our said sons, before the youngest of our surviving sons shall have reached the age of twenty one years, such deceased son leaving surviving him, a wife or child or children born in lawful wedlock, then such share of such deceased son shall

go to and vest in such surviving wife and child or children born in lawful wedlock, according to the law of descent and distribution prevailing in Texas.

5. In the event of the death of grantor, Gladys Culbertson, prior to the time that our youngest surviving son reaches the age of twenty-one years, leaving surviving her, grantor W. O. Culbertson, then the exclusive control and management of said properties, as provided in paragraph No. I. hereof, shall vest in said W. O. Culbertson alone. In the event of the death of said W. O. Culbertson, prior to the time the youngest surviving son shall have reached the age of twenty one years, and said Gladys Culbertson then still being alive, the joint management of said properties, as provided in said paragraph I. herein, shall vest in said Gladys Culbertson and the oldest surviving son. In the event of the death of both W. O. Culbertson and Gladys Culbertson before the surviving youngest son shall reach the age of twenty-one years, then the right of management and control, as provided in paragraph No. I. hereof, shall vest in the two oldest surviving sons.

6. This agreement and conveyance is made in Texas, where all parties now reside. In the event, that for any reason, the subject matter of this conveyance and contract, shall become involved in litigation, it is hereby provided and made a condition herein, that regardless of where the parties may then reside, or regardless of where the subject matter of the litigation may be located, such litigation shall be controlled and determined by the laws of the state of Texas, the same as if the suits were pending in Texas, and the parties resided in Texas, and the subject matter of the suits should be located in Texas.

In Testimony whereof, witness our hand, at Dalhart, Texas, this the 8th day of December, A. D. 1939, but to become effective on the 1st day of January, A. D. 1940.

W. O. CULBERTSON,
GLADYS CULBERTSON.

The State of Texas,
County of Dallam.

Before me the undersigned authority, on this day personally appeared W. O. Culbertson and wife Gladys Culbertson, known to me to be the persons who executed the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

And the said Gladys Culbertson, wife of said W. O. Culbertson, having been examined by me separate and apart from her husband and having the same fully explained to her, she the said Gladys Culbertson acknowledged such instrument to be her act and deed and that she had willingly signed the same for the purposes and considerations therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office, this the 8th day of December, 1939.

R. E. STALLCUP,
Notary Public, Dallam
County, Texas.

My Commission expires June 1st, 1941.

179 PETITIONER'S EXHIBIT 6.

The Tax Court of the U. S., Div. 4, Docket 4184-5. Admitted in Evidence Nov. 13, 1946.

$57674.80 Dalhart, Texas, January 1st, 1940.

On or before one year after date, we promise to pay to the order or W. O. Culbertson & Wife (Gladys Culbertson) the sum of Fifty Seven Thousand Six Hundred Seventy Four and 80/100 Dollars, with interest from date at the rate of four per cent per annum. payable at Dalhart, Texas. This note is given in payment of an undivided one-half interest in an to the W. O. Culbertson Sons ranch, in Harding county, New Mexico, said ranch including cattle, leases, horses, ranch equipment of whatsoever kind.

W. O. CULBERTSON, JR.,
RICHARD R. CULBERTSON,
JOE JACK CULBERTSON,
EUGENE CULBERTSON.

Credit	$ 5,930.00
Of January 1940 overcharge on original Note.	
Balance due on Note	$51,744.80
Credit.	
Dec. 30/1940 Gift as shown on WOC 1940 Income report & Ledger account	4,000.00
Balance due on Note	47,744.80
Credit June 10th/41	30,000.00
Balance due on the above note as of June 10th/41	17,744.80
Credit.	
June 10th/1941 Gift	17,744.80

Paid in Full as of June 10/1941.

INCORPORATED UNDER THE LAWS OF THE STATE OF ARIZONA

No. 6465 — ONE SHARE

AMERICAN HEREFORD ASSOCIATION

KANSAS CITY, MISSOURI

THIS IS TO CERTIFY THAT *W. O. CULBERTSON & SONS* of *DALHART, TEXAS*

is the owner of **ONE SHARE** *of the Capital Stock of the*

AMERICAN HEREFORD ASSOCIATION,

and accepts this Certificate subject to the Articles of Incorporation and By-Laws of the Association and agrees to abide by all the Rules and Regulations of the Association.

This Certificate is issued subject to a lien for any indebtedness due to the Association from the holder hereof.

In Witness Whereof, *the said Association has caused this Certificate to be signed by its duly authorized officers, and to be sealed with the seal of the Corporation.*

Dated November 13, 1939

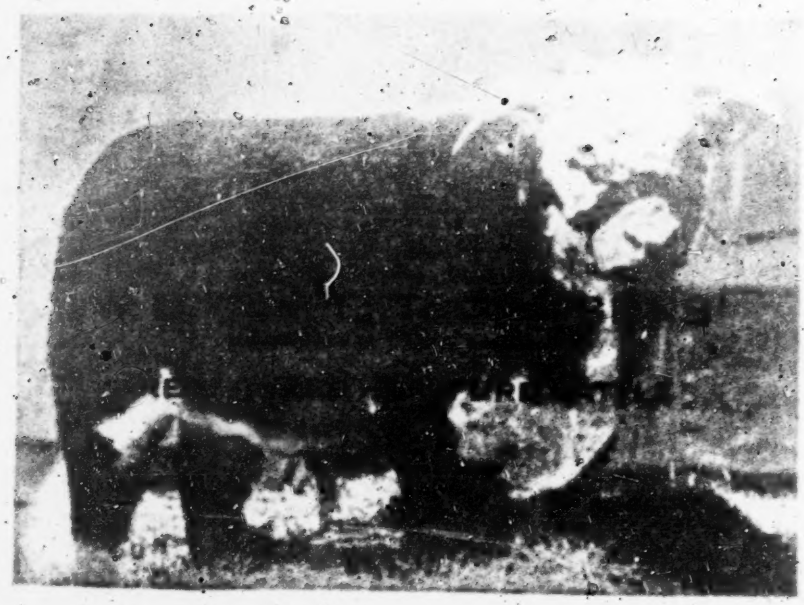
T339

SECRETARY

Seal

PRESIDENT

W. O. CULBERTSON



W. O. CULBERTSON, JR.
RICHARD CULBERTSON
JOE JACK CULBERTSON
EUGENE CULBERTSON

JAYHAWKER OPENING
NO. 5748544
SIRE OF POLLED DORSET RAMS
SIRE OF HEREFORD STEERS

RANCH LOCATED
DUSTERSON, NEW MEXICO

THE TAX COURT OF THE U.S.
DIV. ... DOCKET ...
ADMITTED IN EVIDENCE
NOV 1 1946
PETITIONER'S EXHIBIT 8
RESPONDENT'S

THE TAX COURT OF THE U.S.
DIV. 4 DOCKET 4784
ADMITTED IN EVIDENCE
NOV 1 1946
PETITIONER'S EXHIBIT 8
RESPONDENT'S

183 PETITIONER'S EXHIBIT 9.

The Tax Court of the U. S., Div. 4, Docket 4184-5. Admitted in Evidence Nov. 13, 1946.

No. 3040.

W. O. Culbertson, Jr. et al.
vs.
W. O. Culbertson, Sr. et al.

On this the 27th day of March 1944, coming on to be heard the above styled cause, and the plaintiffs came by their attorney and announced ready for trial, and the defendants came in person and announced for trial, and a jury being waived, the Court heard the pleadings of the parties, and the evidence introduced in behalf of all parties, finds;

(1) That on November 6th, 1939, plaintiffs, W. O. Culbertson, Jr., and Richard Culbertson, Joe Jack Culbertson, Eugene Culbertson, and the defendants, W. O. Culbertson, Sr., and wife Gladys Culbertson, entered into a co-partnership, for the purpose of operating a cattle ranch in Harding County, New Mexico, the property of which consisted of cattle, horses, land leases, ranch equipment, of the total value of approximately one hundred thousand dollars.

(2) That when such partnership was so formed, W. O. Culbertson, Sr., and wife Gladys Culbertson, became the owner of an undivided one-half of the property of such co-partnership; that W. O. Culbertson, Jr. became the owner of an undivided one-eighth, and Richard Culbertson became the owner of an undivided one-eighth, and Joe Jack Culbertson became the owner of an undivided

one-eighth interest of all the property of such co-partnership, and its properties.

(3) That on the 31st day of December, 1940, by arrangement and agreement of the members thereof, Fannie Culbertson became a member of such partnership, by purchase of interest from W. O. Culbertson, Sr. and Gladys Culbertson, of an undivided one-eighth interest in the properties of such co-partnership.

(4) That subsequent to the time Fannie Culbertson became a partner, the interests of each partner was so changed by agreement of parties, so that W. O. Culbertson, Sr. and wife, Gladys Culbertson, became the owners of an undivided one-sixth interest, W. O. Culbertson, Jr. became the owner of an undivided one-sixth interest, Richard Culbertson became the owner of an undivided one-sixth interest, Joe Jack Culbertson, became the owner of an undivided one-sixth interest, Eugene Culbertson became the owner of an undivided one-sixth interest, Eugene Culbertson became the owner of an undivided one-sixth interest, and Fannie Culbertson became the owner of an undivided one-sixth interest, in all the property of such co-partnership.

(5) That the co-partnership so formed on the 6th day of November, 1939, has never been dissolved, ended, discontinued or abrogated, but is now in full force and effect, except as to changes of interest as herein above stated, and that at this time, such co-partnership is in full and active operation as a cattle ranch enterprise.

(6) That on the 8th day of December 1939, the defendants, W. O. Culbertson, Sr. and Gladys Culbertson, executed and acknowledged, an instrument in writing, offered in evidence herein, and a copy of which is attached to the plaintiffs petition.

(7) That at the time of the execution of such instrument, neither of the plaintiffs knew of its execution, and never consented to its execution, and never thereafter acted upon or ratified such instrument.

From the evidence introduced in the trial, the Court finds, and holds as a matter of law:

(a) That on the 6th day of November 1939, the defendants, W. O. Culbertson, Sr., and wife, Gladys Culbertson, and W. O. Culbertson, Jr., and Richard Culbertson, and Joe Jack Culbertson, and Eugene Culbertson, entered into a valid and legal co-partnership arrangement and enterprise, for the purpose of owning and operating a ranch enterprise, located in Harding County, New Mexico.

(b) That the respective interests of such partners, when such co-partnership was formed, was as follows, to-wit: W. O. Culbertson, Sr. and wife, Gladys Culbertson, an undivided one-half interest in such enterprise, and W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson, and Eugene Culbertson, each an undivided one-eighth interest in the properties of such co-partnership.

(c) That on the 31st day of January, 1940, Fannie Culbertson acquired an interest in the property of the partnership and became a member thereof by purchase from W. O. Culbertson, Sr. and Gladys Culbertson, of an undivided one-eighth interest in all the assets and properties of the co-partnership.

(d) That except for the addition in membership, and the change in interest of the individual members, such partnership has continued since its organization on the

6th day of November, 1939, since which time, it has at no time been dissolved, discontinued, abandoned or abrogated, but at all times since such date, has been a valid co-partnership and has been at all times, actively engaged in the ranching business in Harding County, New Mexico.

(e) That by transfer of individual interests, subsequent to the 31st day of January, 1940, the properties of such co-partnership is now owned and held by the following persons, and in the following interests: W. O. Culbertson, Sr. and wife Gladys Culbertson, an undivided one-sixth interest; W. O. Culbertson, Jr. an undivided one sixth interest; Richard Culbertson an undivided one-sixth interest; Joe Jack Culbertson an undivided one-sixth interest; Eugene Culbertson, an undivided one-sixth interest, Fannie Culbertson, an undivided one-sixth interest.

(f) That the instrument executed by W. O. Culbertson, Sr. and Gladys Culbertson, defendants, on the 8th day of December, 1939, offered in evidence, and a copy of which is attached to the plaintiffs' petition, was executed by the defendants, without the knowledge of the plaintiffs, and has never been acted upon or ratified by the plaintiffs, is wholly void in law, and has no effect as effecting the interests of the members of the Co-partnership, and the legal rights of the members thereof.

It is therefore, the decision, the declaration, the order and judgment of the Court, that W. O. Culbertson and Sons, is a legal and valid co-partnership, organized and existing for the purpose of owning and operating a ranch in Harding County, New Mexico, and that the members of such co-partnership are W. O. Culbertson, Sr., Gladys Culbertson, W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson, Eugene Culbertson, and Fannie

Culbertson, and their respective interest are as set out in this judgment.

That the instrument dated December 8th, 1939, executed by W. O. Culbertson, Sr. and wife Gladys Culbertson, is wholly void in law, and has no legal effect on the properties and interests of the Co-partnership of W. O. Culbertson and Sons, and in no manner effects the legal rights of the members of such co-partnership and their rights in same, is wholly void and ineffective.

JAMES W. WITHERSPOON,
Presiding Judge.

The State of Texas,
County of Dallam.

I, R. U. Counts, Clerk of the District Court in and for said County and State, hereby certify the above and foregoing to be a true and correct copy of the Judgment of the Court in the case of W. O. Culbertson, Jr. et al vs. W. O. Culbertson, Sr., et al, Numbered 3040 as the same appears of record in the Minutes of the District Court of Dallam County, Texas, in Vol. 9; Page 385, and on file in my office.

Given Under My Hand And Seal Of Office, this 28th day of March 1944.

(Signed) R. U. COUNTS,
Clerk, District Court, Dallam County, Texas.

187 RESPONDENT'S EXHIBIT A.

The Tax Court of the U. S., Div. 4, Docket 4184-5. Admitted in Evidence Nov. 13, 1946.

State of Texas.
County of Dallam.

Whereas, on the 8th day of December, 1939, W. O. Culbertson and wife, Gladys Culbertson, executed a certain trust instrument, by the terms of which a limited partnership was created between themselves and their sons, W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson and Eugene Culbertson, and by the terms of which a conditional conveyance was made to each of said sons of an undivided one-eighth interest in and to certain properties described in said trust instrument, and the Grantors therein retained to themselves an undivided one-half interest in and to the property so described, a true copy of such trust instrument being hereto attached, marked Exhibit A, and made a part of this instrument in so far as necessary to reflect the tenor and effect of this conveyance now about to be executed by the said W. O. Culbertson and Gladys Culbertson, and;

Whereas, said trust instrument, and the partnership thereby created, is now in full force and effect, and;

Whereas, the said W. O. Culbertson and wife, Gladys Culbertson, now desire to make conveyance to their minor daughter, Fannie Culbertson, a like conveyance of an interest in such partnership, equal to the interest conveyed to each of said sons;

Now, Therefore, we, W. O. Culbertson and wife, Gladys Culbertson, for and in consideration of the sum of Ten Dollars ($10.00) paid, and for other good and valuable

consideration, do hereby and by these presents grant, sell and convey unto the said Fannie Culbertson an undivided one-eighth interst in and to all the property now owned and held by the co-partnership of W. O. Culbertson and Sons, wherever such property may be now located, and being an undivided one-fourth part of the partnership interests now owned and held by said W. O. Culbertson and Gladys Culbertson, but this conveyance of such interests is made subject to all the terms and conditions of the said trust instrument, dated 8th day of December, 1939, a copy of which being hereto attached and made a part hereof.

In Testimony Whereof, Witness Our Hands At Dalhart, Texas, this 31st day of December, 1940.

W. O. CULBERTSON,
GLADYS CULBERTSON.

The State of Texas,
County of Dallam.

Before me, the undersigned authority, on this day personally appeared W. O. Culbertson and wife, Gladys Culbertson, known to me to be the persons who executed the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

And the said Gladys Culbertson, wife of the said W. O. Culbertson, having been examined by me separate and apart from her husband and having the same fully explained to her, she the said Gladys Culbertson acknowledged such instrument to be her act and deed and that she had willingly signed the same for the purposes and

consideration therein expressed, and that she did not wish to retract it.

Given Under My Hand And Seal Of Office, this the 31st day of December, 1940.

W. R. ROBINSON,
(W. R. Robinson)
Notary Public, Dallam
County, Texas.

(Seal)

My Commission expires June 1, 1941.

The state of Texas
County of Dallam.

[illegible] day
[illegible] culed
[illegible] executed the
[illegible] to me that they execu-
[illegible] consideration therein

[illegible] wife of said W. O.
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[illegible] fully explained to her,
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[illegible] herself.

[illegible] and seal of office, this the
[illegible]

Notary Public, Dallam County, Texas.

My commission expires June 1st, 1941.

[illegible] Texas., May 1st 19 41

[illegible] promise to pay to

[illegible] A Gilstrap Culbertson. 29/100

[illegible] Dollars

[illegible] at Dalhart, Texas.

Value received Fannie Culbertson

Fannie Culbertson,

No. Due 1 Day after date

Respondent's Exhibit "B"—Petition in Case W. Culbertson, Jr., Et Al., vs. W. O. Culbertson, Sr., Et Al., Texas State Court, No. 3040: Conveyance and Trust Agreement from W. O. Culbertson and Glayds Culbertson to W. O. Culbertson, Jr., et al., dated 12/8/39, effective 1/1/40; Answer of Defendants in Case No. 3040, Omitted from the Printed Record, Pursuant to Designations of Counsel as to Printing Record, copied at pages 1 and 1-B.

* * * * * * *

198 RESPONDENT'S EXHIBIT C.

The Tax Court of the U. S., Div. 4, Docket 4184-5. Admitted in Evidence Nov. 13, 1946.

Question and Answer Transcript.

Original.

In the District Court of Dallam County, Texas.

W. O. Culbertson, Jr.
vs. No. 3040.
W. O. Culbertson, Sr.

Appearances:
Hon. R. E. Stalcup, Dalhart, Texas, for the Plaintiffs, W. O. Culbertson and wife, per se.

Be It Remembered, that in the above styled cause, the Court on the 27th day of March, 1944, said time being a continuation of the regular term of said Court, rendered a judgment in said cause, and that the testimony offered

at the hearing of such cause, as set out herein is a full, true and correct statement of such testimony, in question and answer form, together with the exhibits offered in evidence, and is as follows, to-wit:

Mr. Stalcup:

The Plaintiffs call as a witness, the Defendant, W. O. Culbertson.

W. O. Culbertson, one of the Defendants, being sworn by the Court, testified as follows:

201 Direct Examination.

(By Mr. Stalcup):

Q. Mr. Culbertson, you are W. O. Culbertson?

A. Yes, sir.

Q. You are named as one of the Defendants in this suit, now before this Court?

A. Yes, sir.

Q. Mrs. Gladys Culbertson is your wife?

A. Yes, sir.

Q. She is likewise a Defendant?

A. Yes, sir.

Q. W. O. Culbertson, Jr., Richard Culbertson, Joe Jack Culbertson, and Eugene Culbertson, are your sons, and Fannie Culbertson is your daughter?

A. Yes.

Q. And they are the Plaintiffs in this case?

A. Yes, sir.

Q. Mr. Culbertson, were you a member of the old co-partnership of Coon and Culbertson?

A. Yes, sir.

Q. Engaged in the cattle business for many years, here in the Panhandle, and in New Mexico?

A. Yes, sir.

Q. Mr. Coon is now deceased?

A. Yes, sir.

Q. When did that partnership begin?

A. Which partnership?

Q. The Coon and Culbertson partnership?

A. About '15.

Q. You mean 1915?

A. Yes, I mean 1915.

Q. That is about 29 years ago now?

A. Yes, sir.

Q. I believe you ended that partnership about '39?

A. Yes, sir.

Q. That is a friendly way, and liquidating it and dividing it up, somewhat?

A. Yes, sir.

Q. You settled your obligations that you owed then?

A. Yes.

Q. And divided your funds and disposed of the cattle you had on hand?

A. Yes, sir, to an extent, all of the registered stuff.

Q. Now, about the summer or fall of 1939, did you or not, you and Mr. Coon have a certain bunch of cattle still on hand?

A. Yes, sir.

Q. I believe along about November, 1939, it was your desire to take over from the partnership a certain line of cattle that the partnership owned?

A. Yes, about that; the certain date, I just don't remember when it came up.

Q. Did you or not have a conversation with Mr. Coon with reference to buying his side, his interest in this string of cattle?

A. Yes, I did.

Q. Did you finally buy these cattle from Mr. Coon?

A. Yes, sir.

* * * * * * *

(By Mr. Stalcup):

Q. In other words, when you sold the boys these cattle they gave you a note at that time?

A. Yes, they did.

Q. Then, following the transaction,—well, I will show this in a few minutes;—I advised you to get a new form of note to correspond with another transaction and take up the old note?

A. That is right.

Q. Then, you gave this note and destroyed the old notes dated as of November 6th?

A. Yes, you have got it right. You might have done that.

Q. But, this note of January 1st, is really the same consideration that was contained in the old notes that the boys gave you when the partnership was formed?

A. Yes, sir.

(The Court):

Q. This note here, you have marked Plaintiffs' Exhibit No. 7, introduced here, is the note which took up another note that the boys gave the same day of the sale?

A. Yes, that is a renewal note.

(By the Court):

Q. This is a renewal note and extension of the same day that you gave the boys the bill of sale?

A. Yes, that is a renewal of it. I did that under advice of Bob (Mr. R. E. Stalcup) here.

(By the Court):

Q. He is your attorney here?

A. Yes, under his advice I did that.

(By Mr. Stalcup):

Q. After the formation of the partnership of W. O. Culbertson and sons, I will ask you if you and your sons

had in mind that you would probably want to materially enlarge your cattle holdings over there in New Mexico?

A. I don't know that we talked much about that.

Q. Well, you had it in mind that you might need to borrow a lot of money?

A. Let me explain that this way. I know that you can't run a business without having a financial place to borrow money. We all know that,—to run your business on.

Q. Well, in order to prepare yourself, in case you needed the money, did you take up the matter with some cattle loan company in Fort Worth?

A. Yes, I talked to Mr. Wright, or his general manager of the North Texas Finance Credit Corporation that we did business with before. However, at this time, we did not owe them anything,—but at this time we might not need the finances. I told him (Mr. Wright) about my new partnership.

Q. You explained to Mr. Wright why you might need some money and told him all the facts about the partnership?

A. Yes, I told him I had a new partnership;—that we had dissolved the other one.

Q. That Coon & Culbertson was out?

A. Yes, they (Coon & Culbertson) had used the money with this firm and we had settled up.

Q. You had paid off?

A. Yes, we did not owe them anything.

Q. Then, you had an idea you might need,—W. O. Culbertson and Sons might need some more money, and you went back there?

A. Well, I happened to be in Fort Worth and told him. I took it up with him while there, at his office in Fort Worth.

Q. Well, did Mr. Wright give you or attempt to give you any advice or suggestion, or make any objections?

A. Yes.

Q. On the partnership arrangement or tell you to do something?

A. Yes, I talked to Mr. Wright about it. He said: "You better get your partnership business in a form of writing whereby you will have the right to go on and borrow money". And knowing that the boys were liable to go to the Army and would not be here, that was talked up with Mr. Wright, that they might go to the Army,—which has happened. We had that in mind. He said: "You better get that in a form of writing,—a common partnership".

Q. Now, it was Mr. Wright's idea, conveyed to you, that you should prepare yourself or have prepared, some kind of a document, assuming for yourself, regardless of the law or anything else resulting, control and management of the partnership affairs;—having that in view, you went to your attorney in Dalhart and told him what kind of an instrument to draw up for you?

A. Yes, and to show that I could sell the cattle and turn in the proceeds and get the business running, having in mind that the boys might have to go to the Army.

Q. Then, you came to me, to see me, your lawyer to talk to me and you told me what Mr. Wright required of you?

A. Yes, that Mr. Wright had suggested that idea to me.

Q. And you had me prepare for you an instrument?

A. I did not have that prepared. I told you about what I wanted, but did not tell you how to write it. I told you about what I wanted;—something that you wrote up.

Q. Now then, I did prepare an instrument that expresses your wishes in the matter?

A. Yes, you prepared an instrument there that you said you thought was just about what I wanted.

Q. You did that, following Mr. Wright's suggestion or request?

A. Following his suggestions? He did not request anything.

Q. Well, in preparing that document and signing it, you and your wife, you did not go and tell the boys what you were doing or intended to do,—you just went ahead?

A. I never told the boys anything about it. They never knew anything about it at all.

Q. And, up to this minute, they have never done anything in the way of ratifying of what you did;—they just did not do anything?

A. No, they did not even read it—they did not do anything about it, until later.

Q. They did not do anything about it for two or three years?

A. No.

Q. It was not their document;—it was your document?

A. I followed Mr. Wright's request,—to get something in the form of a partnership so he could carry me, so he could carry my finances with him. He said: "We would be glad to carry it";—and they have an association whereby they are discounting paper,—and he explained that to me.

* * * * * *

(By Mr. Stalcup):

Q. You had the money to pay Mr. Coon for his interest in the cattle?

A. Yes, I had that money, but I got an Affidavit setting it out to them.

Q. Since Fannie Culbertson became a partner and having an interest in the cattle business, on December 31st, 1940, the respective interests of the various parties have been changed again, have they?

A. Yes, they have.

Q. That has been largely done by agreement of the parties and as a matter of bookkeeping?

A. I have made at different times, a gift report to the Government, showing I gave so much. You have a right to make Forty Thousand in a year. That has been turned in as a gift. That took care of some of this payment.

Q. By gift, or sale, or otherwise, the partnership interests have been changed from its original status, to until today you and your wife Gladys Culbertson, own only a one-sixth interest in the cattle business?

A. Yes, only a one-sixth interest in the cattle business.

Q. How much does Fannie Culbertson own?

A. A one-sixth interest.

Q. The four boys own a one-sixth interest each; and there were five children, each owning a one-sixth interest,—and you and your wife have one-sixth interest?

A. Yes, that is in the cattle business. We own the ranches.

Evidence Closed.

* * * * * *

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FORM 1065
Treasury Department
Internal Revenue Service

PARTNERSHIP RETURN OF INCOME 1940

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1940

or fiscal year beginning , 1940, and ended , 1941

(File this return not later than the 15th day of the 3d month following the close of the taxable year)

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

W.O.CULBERTSON & SONS
(Name)

P.O.BOX 1410
(Street and number)

DALHART (Post office) DALLAM (County) TEXAS (State)

Business or Profession

Do Not Use This Space

File Code

Serial No. 973224

District

(Date Received)

APR 17 1941

GROSS INCOME

1. Gross receipts from business or profession		$ 29,237.17
2. Less cost of goods sold:		
(a) Inventory at beginning of year	$ 109,250.00	
(b) Merchandise bought for sale	4,665.88	
(c) Cost of labor, supplies, etc.		
(d) Total of lines (a), (b), and (c)	$ 104,915.88	
(e) Less inventory at end of year	131,460.00	26,544.48
3. Gross profit (or loss) from business or profession (item 1 minus item 2)		$ 55,781.68
4. Income (or loss) from other partnerships, syndicates, pools, etc. (state name, address, and amount)		
5. Interest on bank deposits, notes, corporation bonds, etc. (except interest to be reported in item 6)		
6. Interest on tax-free covenant bonds upon which a Federal income tax was paid at source		
7. Interest on Government obligations, etc. (from line (2), Schedule A)		
8. Rents		
9. Royalties		
10. Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule B)		
11. Dividends		
12. Other income (state nature of income)		
13. Total income in items 3 to 12 (enter here and on line 3, Schedule F (1))		$ 55,781.68

Col. Int. Rev. Dist. MAR 19

DEDUCTIONS

14. Salaries and wages (do not include compensation for partners)	$ 4,220.20	
15. Rent	2,086.28	
16. Repairs	1,017.41	
17. Interest on indebtedness (explain in Schedule E)	1,084.64	
18. Taxes (explain in Schedule C)	786.38	
19. Losses by fire, storm, shipwreck, or other casualty, or theft (attach schedule, see Instruction 7)		
20. Bad debts (explain in Schedule D)		
21. Depreciation (explain in Schedule E)	1,116.03	
22. Depletion of mines, oil and gas wells, timber, etc. (attach schedule, see Instruction 22)	19,487.87	
23. Other deductions authorized by law (explain in Schedule F)		
24. Total deductions in items 14 to 23		$ 34,719.41
25. Ordinary net income (item 13 minus item 24)		$ 21,062.27
26. Net short-term capital gain (or loss) (from line 1, column 4, Summary, Schedule H)		
27. Net long-term capital gain (or loss) (from line 2, column 4, Summary, Schedule H)		

NOTE.—In order that this return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for herein must be set forth FULLY and CLEARLY.

Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 7)

1. Obligations or securities	2. Amount owned at end of year	3. Interest received or accrued during the year
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	$	$
(b) Obligations issued under the Federal Farm Loan Act, or under such Act as amended		
(c) Obligations of the United States issued on or before September 1, 1917		
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness		
(e) United States Savings Bonds and Treasury Bonds	$	$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported on line (b) above)		
(g) Total of lines (e) and (f), column 3 (enter as item 7, page 1)		$

Schedule B.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (cash or fair market price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition but not before March 1, 1913 (Furnish details)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		$	$	$	$	$
Total net gain (or loss) (enter as item 10, page 1)						$

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

If any of the above items were acquired by you other than by purchase, explain fully how acquired:

Schedule C.—TAXES. (See Instruction 14)

Nature	Amount
	$
Total (enter as item 18, page 1)	$

Schedule D.—BAD DEBTS. (See Instruction 20)

1. Taxable year	2. Net income reported	3. Sales on account	4. Bad debts charged off by corporation if no reserve is carried on books	If corporation carried a reserve: 5. Gross amount added to reserve	6. Amount charged against reserve
1937	$	$	$	$	$
1938					
1939					
1940					

NOTE. Check whether deduction claimed represents worthless debts charged off ☐, or is an addition to a reserve ☐.

Schedule E.—DEPRECIATION. (See Instruction 21)

1. Kind of property (If building, state material of which constructed)	2. Date acquired	3. Cost or other basis (If you did not include land or other non-depreciable property)	4. Assets fully depreciated on use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		$	$	$	$			$
Total (enter as item 21, page 1)								$

Schedule F.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 17 AND 23

1. Item No.	2. Explanation	3. Amount	1. Item No. (continued)	2. Explanation (continued)	3. Amount (continued)
		$			$

Schedule G.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE A. (See Instruction 13)

1. Nature of income	2. Nature of exemption	3. Amount
		$

W. O. Culbertson & Sons,
High Grade & Registered Cattle,
Box 1410. Dalhart, Texas.

W. O. Culbertson

Ranch Located
Bueyeros. N. M.

W. O. Culbertson, Jr.
Richard Culbertson.
Joe Jack Culbertson.
Eugene Culbertson.

1940.

Item 17, Schedule F—Interest.

National Finance Credit Corporation of Texas, Fort Worth, Texas	$ 987.91
First National Bank in Dalhart, Dalhart, Texas	36.73
	$1,024.64

W. O. Culbertson & Sons,
High Grade & Registered Cattle,
Box 1410. Dalhart, Texas.

W. O. Culbertson

Ranch Located
Bueyeros. N. M.

W. O. Culbertson, Jr.
Richard Culbertson.
Joe Jack Culbertson.
Eugene Culbertson.

1940.

Item No. 16—Repairs.

Dalhart Hardware Co.	$ 128.53
Foxworth Galbraith Lmbr. Co.	101.78
Shollenbarger Merc.	224.42
M. A. Reed	106.00
Jones Paint Store	64.25
B. Shiplett	52.21
J. F. Ross	100.00
John Burns Lmbr. & Hwd. Co.	57.63
A. C. Beller	31.46
Miscellaneous	151.33
	$1,017.61

W. O. Culbertson & Sons,
High Grade & Registered Cattle,
Box 1410. Dalhart, Texas.

W. O. Culbertson

Ranch Located
Bueyeros. N. M.

W. O. Culbertson, Jr.
Richard Culbertson.
Joe Jack Culbertson.
Eugene Culbertson

1940.

Deductions—Item 22, No. 15—Rent.

W. C. DeBaca, Clayton, New Mex.	$3,204.00
Various Grass Pasture Rentals	98.00
W. O. Culbertson (Swoyer Ranch), Dalhart, Texas	1,500.00
Norman Libbey, Bueyeros, New Mex.	4,284.20
	$9,086.20

W. O. Culbertson & Sons,
High Grade & Registered Cattle,
Box 1410. Dalhart, Texas.

W. O. Culbertson

Ranch Located
Bueyeros. N. M.

W. O. Culbertson, Jr.
Richard Culbertson.
Joe Jack Culbertson.
Eugene Culbertson.

1940.

Item 23—Other Deductions.

Stationery & Postage	$ 159.12
Coal (for Ranchhouses)	104.94
Commissions	44.00
Telph-Tlgrms & Advertising	390.86
Oil & Gas (used on ranches)	962.60
Automobile repairs	624.45
Groceries & Meals	1,297.51
Freight & Trucking	1,536.18

Feed	12,494.29
Miscellaneous (Dues, Registering, Drugs, etc.)	1,813.38
Total	$19,427.27

W. O. Culbertson & Sons,
High Grade & Registered Cattle,
Box 1410. Dalhart, Texas.

W. O. Culbertson

Ranch Located
Bueyeros. N. M.

W. O. Culbertson, Jr.
Richard Culbertson.
Joe Jack Culbertson.
Eugene Culbertson.

1940.

Item No. 21—Depreciation.

	Date Acquired	Additions	Rate	Prior Reserve	Depreciation 1940
Autos-Pickups, etc.—					
Ford Truck	2- 1-38	1,187.11	33⅓	395.70	395.70
Pickup	7- 1-38	725.95	"	241.99	241.98
Ford Auto	2- 1-39	585.46	"	178.86	195.15
Auto	1-31-40	556.85	"	.....	170.17
Trailer	8- 1-40	131.60	"	.....	18.30
					1,021.30
Furniture—					
Various	1-31-39	68.90	10%	6.32	6.89
"	3- 1-39	20.00	"	1.66	2.00
"	5- 1-39	267.80	"	17.86	26.78
"	7- 1-39	25.00	"	1.24	2.50
"	1-31-40	235.00	"	.....	21.56
					59.73
Farm Equipment—					
Various	1- 1-40	350.00	"	....	35.00
Total					$1,116.03

Schedule G.—TAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE A. (See Instructions 14)

Schedule H.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instructions 26, 27)

1. Kind of property (If necessary, attach statement of the acquired (specify sub-division below)	2. Date acquired (Mo., Day, Year)	3. Date sold (Mo., Day, Year)	4. Gross sales price (see instr. under which period)	5. Cost or other basis	6. Expense of sale and cost of improvements (unless shown in column 5)	7. Depreciation allowed (or allowable) since acquisition	8. Gain or loss (Col. 4 plus Col. 7 less Col. 5 and 6)	Gain if included in other income
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS								
			$	$	$	$	$	
Total net short-term capital gain or loss (enter in line 1, column 2, of summary below)							$	
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS								
			$	$	$	$	$	
Total net long-term capital gain or loss (enter in line 2, column 2, of summary below)							$	
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS								
			$	$	$	$	$	
Total net long-term capital gain or loss (enter in line 3, column 2, of summary below)							$	

SUMMARY OF NET CAPITAL GAINS OR LOSSES

	2. Net gain or loss (as by taking into account items shown in columns 5, 6, and 7 of Schedule H, above)		3. Net gain or loss (as by taking into account items shown in columns 5 and 6 of Schedule H, above)		4. Total net gain or loss (as by taking into account items shown in columns 4, 5, 6, and 7 of Schedule H, above)	
	Gain	Loss	Gain	Loss	Gain	Loss
Total net short-term capital gain or loss (enter in column 5, line 1, amount of gain or loss shown in column 4)	$	$	$	$	$	$
Total net long-term capital gain or loss (enter in column 5, line 2, amount of gain or loss shown in column 4)	$	$	$	$	$	$

If any of the above items were acquired by you other than by purchase, explain fully how acquired.

Schedule I.—CONTRIBUTIONS PAID. (See Instruction 28)

	Amount
	$

Total (enter in column 16, Schedule B)

Page 4

Schedule J.—PARTNERS' SHARES OF INCOME AND CREDITS. (See Instruction 28)

	1. Name and address of each partner (If corporate membership shown) Where return of partner or member is filed in any other collection district, specify district. If the full name of any partner was not dictated to the business, the percentage of time devoted must be stated	2. Dividends not included in line 1 on Common stock obligations, etc., subject to excise only (from 2b, page 1, column total 7 (a), page 1)	3. Net short-term gain (or loss) from sale or exchange of capital assets (from Schedule H, Summary, line 1, column 4)	4. Net long-term gain (or loss) from sale or exchange of capital assets (from Schedule H, Summary, line 2, column 4)
(a)	Miss Fennie Culbertson	$ 7825 17	$	$
(b)	Richard B. Culbertson	7825 17		
(c)	Joe Jack Culbertson	7825 17		
(d)	Eugene Culbertson	7825 17		
(e)	W. O. Culbertson, Jr'	9025 17		
(f)	W. O. Culbertson Sr'	23475 48		
(g)				
Totals		$ 63601 83	$	$

CONTINUATION OF SCHEDULE J

	5. Tax-exempt interest received or accrued	6. U.S. obligations (see Sch. A)		7. Other interest on certain governmental obligations (see Sch. A)		8. Earned income credit (see Sch. J)	9. Federal income tax paid or withheld at source (from line 6, page 1)	10. Income and profits taxes paid to a foreign country or United States possession
		Principal	Interest	Principal	Interest			
	$	$	$	$	$	$	$	$
(a)						1565 03		
(b)						1565 03		
(c)						1565 03		
(d)						1565 03		
(e)						1805 05		
(f)						4695 10		
Totals	$	$	$	$	$	12760 25	$	$

QUESTIONS

1. Date of organization January 1st/1941
2. Nature of organization (partnership, syndicate, pool, joint venture, etc.) Partnership
3. Was a return filed for the preceding year? Yes (If not, explain why.)
4. (Check whether this return was prepared on the cash ☐ or accrual basis.)
5. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market, whichever is lower. Cost

If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock.

6. Did the taxpayer at any time during the taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No

If answer is "Yes," attach schedule required by Instruction I.

7. Was return of information on Form(s) 1096 and 5999 filed for the calendar year 1941? (See Instruction H) Yes

AFFIDAVIT (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return, made in good faith, for the accounting period stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to before me this 16 day of July, 1942.

W O Culbertson
(Partner or member)

(Signature and title of officer administering oath)

(Address of partner or member)

(If this return was prepared for you by some other person, the following affidavit must be executed)

AFFIDAVIT (See Instruction D)

I (we) swear (or affirm) that I (we) prepared this return for the organization named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income of the person for whom this return has been prepared of which I (we) have any knowledge.

Subscribed and sworn to before me this

20th day of January, 1942.

G. Tolar Notary Public,

The Dunn County, Texas, expires [illegible]

(Signature of person preparing the return)

(Signature of person preparing the return)

(Name of firm or employer, if any)

Respondent's Exhibit "F"—Letter, W. O. Culbertson & Sons to William G. Cullen, Head, Southwestern Division, Technical Staff, Bur. of Int. Revenue, dated 4/23/46; omitted from the Printed Record, pursuant to Designations of Counsel as to Printing Record, copied at pages 1 and 3.

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259 PRAECIPE FOR RECORD.

The Tax Court of the United States.

Filed Nov. 21, 1947.

W. O. Culbertson, Petitioner,
vs. Docket No. 4184.
Commissioner of Internal Revenue, Respondent.

Gladys Culbertson, Petitioner,
vs. Docket No. 4185.
Commissioner of Internal Revenue, Respondent.

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit copies duly certified as correct of the following documents and records in the above styled causes, in connection with the Petition for Review by the said Circuit Court of Appeals for the Fifth Circuit, heretofore filed by the petitioners above named:

(1) Docket entries of the proceedings before the Tax Court of the United States.

(2) Stipulation of the parties for consolidation on petition for review.

(3) Pleadings in the above causes.

(4) Findings of fact and opinion of the Tax Court entered June 24, 1947 (Disney, Judge).

(5) Decisions of the Tax Court of the United States entered August 6, 1947, in Docket 4184 and 4185 (Kern, Judge).

(6) Petition for review and assignments of error, together with the proof of service of notice of filing petition for review and assignments of error.

(7) Statement of the evidence as settled and agreed upon, together with all exhibits received in evidence.

(8) This praecipe.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Fifth Circuit.

BENJAMIN L. BIRD,
(Benjamin L. Bird),
Attorney for Petitioners.

WEEKS, BIRD, CANNON & APPLEMAN,
909-913 Sinclair Building,
Fort Worth, Texas.

Service of a copy of the foregoing praecipe is hereby admitted this 20th day of Nov., 1947, and said praecipe is hereby agreed to.

(Signed) CHARLES OLIPHANT, CAH.
(Charles Oliphant),
Attorney for Petitioners.

.....

Chief Counsel,
Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

CERTIFICATE

The Tax Court of the United States,
Washington.

William O. Culbertson, Sr., Gladys Culbertson, Petitioners,
vs. Docket Nos. 4184, 4185.
Commissioner of Internal Revenue, Respondent.

I, VICTOR S. MERSCH, Clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 260, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 31st day of December, 1947.

VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

(Seal)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 8th, 1948

No. 12232

W. O. CULBERTSON, SR., and GLADYS CULBERTSON

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by Benjamin L. Bird, Esq., for petitioners, and Homer R. Miller, Esq., Special Assistant to the Attorney General, for respondent, was submitted to the Court.

OPINION OF THE COURT—Filed June 30, 1948

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12232

W. O. CULBERTSON, SR., and GLADYS CULBERTSON, Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review of Decision of the Tax Court of the United States (District of Texas)

(June 30, 1948)

Before Hutcheson, McCord, and Waller, Circuit Judges

WALLER, Circuit Judge:

For nearly a quarter of a century William O. Culbertson and R. S. Coon were partners in the cattle-raising business near Dalhart, Texas. Coon raised many cattle but had no children. Culbertson raised both. He had four sons, a daughter, and a one-half interest in approximately fourteen hundred head of cattle at the time of the transaction around which this case centers. Coon furnished the finances; Culbertson looked after the cattle. About the time the

Culbertson boys reached the age of twelve, each, like most ranch-reared boys, began to work on the ranch at various and sundry jobs.

In 1939, due to the age and health of Mr. Coon, it was determined to liquidate the herd and dissolve the partnership. To that end the partnership sold some three hundred and fifty head of Braford cattle to the four boys, but before the transaction was fully completed, a friend of the parties sought to buy these cattle from the partnership. At the suggestion of Mr. Coon, the friend bought them from the boys, paying a profit of $5.00 per head.[1]

By October, 1939, the herd had been reduced to approximately fourteen or fifteen hundred registered cattle. Thereupon Culbertson offered to purchase the remainder of the herd at a price around $65.00 per head. Four persons were present in the office of Coon & Culbertson in Dalhart on the night the proposition of the sale of Coon's interest in the partnership cattle to Culbertson—or to Culbertson for his four sons was tentatively agreed upon. The witnesses all recount Coon's long-standing avocation and hobby of breeding Hereford cattle and his interest in seeing that the strain thus developed should continue. The witnesses all agreed that Coon stated that he would accept Culbertson's proposition to buy his interest in the cattle provided that Culbertson would, in turn, sell same, to the latter's four sons, who had worked on the ranch and who would be able to carry the herd into the future; that Culbertson desired to talk to his sons first; that he did talk to them, and that the offer was accepted and the trade was consummated by a bill of sale from Coon & Culbertson to Culbertson, and another bill of sale from Culbertson to his four sons. All witnesses agreed as to the fine quality of registered Hereford cattle that had been bred through the years, Coon's interest in its continuation, as well as his interest in, and friendship for, the Culbertson boys—for the education of two of whom he had provided in his lifetime and for the other two he had provided in his will.

There was no mention of income tax or tax consequences in the discussions leading up to, and consummating, the deal. All witnesses were agreed that the idea uppermost was the continuation of the cattle-breeding business of Coon & Culbertson through the instrumentality of Culbertson and the sons of Culbertson, who, since childhood, had worked on the ranch with the cattle and one of whom was then foreman, and later manager, of the ranch. There is not the slightest proof in the evidence but that the four Culbertson

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[1] Although this transaction had no direct connection with the partnership that is alleged to have been formed later between Culbertson and his sons, nevertheless, it is indicative of the interest of the Culbertson boys in cattle and the interest of Mr. Coon in the Culbertson boys.

boys each acquired a one-fourth interest in the one-half interest of Coon in the cattle in question. The partnership of Coon & Culbertson, as well as Culbertson and his sons, owned no land but utilized grazing leases.

It is conceded that the father put up the money for the purchase of the cattle from Coon and that he in turn sold that half interest to his sons and took their note therefor; that in addition to the note being given by the boys for the amount necessary to purchase Coon's cattle, they also gave their note for the purchase of a one-half interest in other miscellaneous properties which had theretofore been used at the ranch. Neither is it disputed that a considerable portion of the purchase price was returned to the elder Culbertson by the sale, in due course, of partnership cattle, and that the balance then remaining unpaid on the notes was canceled as a gift. It is also undisputed that thereafter Culbertson gave a one-eighth interest in his own cattle to his daughter, but since it was not contemplated that the daughter would perform services or contribute capital to the partnership, no effort is made here to have her considered, or included, as a partner for tax purposes.

The plan whereby all four of the boys would work on the ranch when they were not in school was disrupted by the War. All were put into the military service. The education of the younger ones was delayed, and at the time of the hearing two of the boys were still in school. Upon his release from the service, the oldest son resumed his job as foreman or manager of the ranch and the second had also done some work there after his return from the War and from college.

The Dalhart newspaper, quoting Mr. Culbertson, announced in December, 1939, the fact of the dissolution of the Coon & Culbertson partnership, and that in the future the business would be operated by the Culbertson boys under the name of Culbertson and Sons. A bank account was opened in the name of W. O. Culbertson and Sons, upon which the father and either of his four sons could check. The membership of Coon & Culbertson in the American Hereford Association at Kansas City, the place where Hereford cattle are registered, was changed to W. O. Culbertson and Sons, to whom an appropriate certificate was issued.

Mr. W. H. Coon, the nephew of the elder Coon, wrote to Mr. Wright, the manager of the National Finance Credit Corporation, on November 23, 1939, stating that: "Mr. W. O. Culbertson and Sons will take over the Coon & Culbertson herd November 1st, 1939. Mr. R. S. Coon is selling his interest in the cattle to this new firm—W. O. Culbertson and Sons." Concededly, W. O. Culbertson and Sons was not a corporation or mere trade name. A partnership return for W. O. Culbertson and Sons for the year 1940 was filed with the Collector of Internal Revenue. The letterheads of W. O.

Culbertson and Sons showed the names of the father and his four sons thereon.

A reading of all the evidence thus far could leave no one in the slightest doubt as to the intent, purpose, and effect of the transaction in question. However, the Commissioner contends that the picture changes upon observance of a second instrument that was drawn up after the first bill of sale was executed from father to sons. This second bill of sale also looms large in the consideration of this case by The Tax Court. It will be remembered that two of the Culbertson boys were minors at the time of the formation of the partnership. It will also be remembered that the new partnership required financing. When inquiry was made from Mr. Wright of the finance company, Mr. Culbertson was told that it would be necessary for him to have some sort a paper showing that he had a right to execute mortgages, sign notes, and the like for the partnership. With only this purpose in view, he sought out an attorney, whose idea of the way to accomplish such a result was to prepare another bill of sale wherein the right to execute mortgages and notes, and manage the affairs of the company until the youngest boy became twenty-one, was ostensibly retained in the father. It is undisputed that neither of the boys was aware of the execution of this second bill of sale until long afterwards. It seems also quite clear that the second paper was without any legal force or effect because the father had theretofore made and delivered to his sons an absolute bill of sale to the cattle with no strings attached. He, acting alone, could no more recall it than

"Can storied urn, or animated bust
Back to its mansion call the fleeting breath."

The father was a ranchman and unlearned, particularly in the law. After the import of the second bill of sale was realized, a proceeding was had in the State Court wherein it was declared null and void. The Tax Court considers this proceeding as collusive. At least it was non-adversary because it was with the consent of all parties that the proceeding was brought and the invalidity of the instrument decreed. Assuredly this paper did not represent any valid agreement of the parties. Had the proceeding been adversary, no other result could possibly have been reached because the second bill of sale was, to say the least, voidable and not binding upon the sons in the absence of their ratification. It would not have protected the finance company as against them. It could not have had the effect of postponing the initiation of the partnership until the youngest son became twenty-one years of age, nor could it have otherwise adversely affected the rights acquired, and vested, under the true bill of sale.

It was the purpose and intent of all the parties to form an actual,

real, and *bona fide* partnership between Culbertson and his four sons, with the full expectation and purpose that the boys would, in the future, contribute their time and services to the partnership. We do not consider that it is illegal, income-tax-wise or otherwise, for a partnership to be formed in consideration, or contemplation, of services rendered, *or to be rendered*, by the partners. The fact that the boys were called into the military service by the United States, as well as the fact that some of them had not, during the tax period, completed their education so as to devote their full time and attention to the partnership is in no wise indicative that the partnership was formed for the purpose of dividing the family income, or for the purpose of income tax savings. The failure by a partner to render service to the partnership or to contribute capital originating in him, is, after all, but a circumstance to be considered in determining the reality or actuality of an alleged family partnership. The failure to do either is not a condition precedent.

There is no evidence but that the partnership was entered into validly and in good faith, and that the first bill of sale from the father to the sons was a legal and binding document; that this partnership was entered into without any idea, purpose, or thought of the tax consequences but with the idea of carrying on the breeding of fine Herefords in the traditions of that section of the country. The fact that in seeking financial assistance a void document was executed by one of the partners which contained ineffective and untrue recitations would not destroy the legality and *bona fides* of the partnership validly entered into theretofore. Undue weight and emphasis given to this invalid document by The Tax Court seem to have led it into a holding that is in disregard of the realities and contrary to the purpose and intent of the parties. When this second bill of sale is considered in the true light of its invalidity, and in the light of the circumstances attending its execution, it will readily be seen that the first bill of sale evidenced the real transaction and that it remained unimpaired and in full force and effect.

In the cases of Commissioner v. Tower, 327 U. S. 280, and Lusthaus v. Commissioner, 327 U. S. 293, the Court determined that the arrangements there were mere devices entered into for income tax savings and purposes and not for the benefit of the partnership. To conclude in this case that the plan and purpose of an aging father to enlist the interest and services of his four ranch-reared, experienced, and stalwart sons in the carrying on of his and his partner's life work was not for the partnership's benefit seems to require the exaltation of suspicion over the realities to an extent that the exigencies of the times for tax collection neither deserve nor demand. There was no showing in 1939, when the partnership was formed, of the anticipation of huge profits. The old partnership was in the process of liquidation and had reduced its herd from

several thousand to fourteen or fifteen hu. dred. No one dreamed then that the lush prices of a year or so later were so close at hand. On the contrary, the old partners were only a short way out of the greatest depression the country has ever known and the memory of hardships, drouths, and dust storms, necessitating the shipping in of foodstuffs for the cattle was still fresh in their minds.[2]

Nor do we think the fact that subsequently, and in an entirely separate transaction, the father undertook to make provision for his daughter by giving her a partnership interest in the cattle which he had retained disproves the *bona fides* of the arrangement with his sons for her interest in the cattle is not a subject of the controversy here. Taxpayer concedes that she contributed no capital and neither performed, nor intended to perform, services in the operation of the ranch.

It seems that out of the cases of Lusthaus v. Commissioner, *supra*, and Commissioner v. Tower, *supra*—which cases were properly decided on their peculiar facts—a concept has been born and is carefully nurtured by the tax collecting agencies that no partnership is valid—income-tax-wise—between members of a family unless the members of the family coming into the partnership actually contribute money or had actually, *theretofore*, rendered services. Neither statute, common sense, nor impelling precedent requires the holding that a partner must contribute capital or render services to the partnership prior to the time that he is taken into it. These tests are equally effective whether the capital and the services are presently contributed and rendered or are later to be contributed or to be rendered. Moreover, a partnership is formed to act in the future and not in the past and when it is fully expected, intended, and agreed that the incoming partner

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[2] Mr. W. O. Culbertson testified as follows:

"Well, we done a lot of visiting, talking about the herd and the hardships and hazards we'd went through and the general conversation about what had happened to us and we'd done a very good job getting through. Had dry weather and shipped hay in to feed the cattle and it was pretty tough. Mr. Coon happened to be able to take care of finances through his credit and we didn't go broke as usually some people did in them years, but we had a general discussion about that and he told me during that night, he brought that up about the cattle and he says he had a desire to see this herd go on, it was a herd of cattle it takes years to develop and he says, 'Developing a good herd of cattle is a lifetime job.' He had made that remark a lot of times, and he had a desire to see the herd go on. He says, 'I will sell you my interest in the herd if you will in turn sell it to your four boys at the price you are paying for it' and this was the price that I had mentioned."

will render services to the partnership, the Government should not be heard to say: "I will not recognize you as a partner even though you in good faith entered into it. I took you into the Army to fight a war and you did not perform services for the partnership as you had agreed to do."

The inquiry as to a family partnership for income tax purposes must relate to evidence bearing on the reality, the actuality, and the bona fides of the transaction,[3] or the absence thereof. Where the proof conclusively shows that a family partnership was entered into for the benefit of the business and not the purpose of evading, avoiding, or dividing, income taxes, it will be deemed a partnership for income tax purposes even as it was recognized in the law for all other purposes.

Income generally should be taxed to him who owns it. The Culbertson boys owned one-half the cattle that produced the income here.

Neither the Constitution, the statutes, nor public policy requires that partnerships between fathers and sons be outlawed or discouraged. The desire of a father in any age or clime, with a business that he cherishes and a son that he loves, to have such son with him in his business and to carry it on when he no longer can, was not rendered an anathema by the Lusthaus and Tower cases, and aberrations from the salutary rules announced in those cases should not now do so.

We think that the evidence shows conclusively that the partnership here was actual, real, *bona fide*, and entered into for the

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[3] See Belcher v. Commissioner of Internal Revenue, 162 F. 2d 974, wherein this Court said:

> "Notwithstanding the fact that there is no Federal statute which makes the gift of a partnership interest to a member of the taxpayer's family illegal, or that expressly lays the tax upon a husband or father who makes a lawful gift of a partnership interest to members of his family, and although it has long been, and is still, the law that a taxpayer has the right to avoid or lessen his taxes by means that are lawfully available, it is now well settled that such means must be realities, not shams, substance, not shadows. Family partnerships are not ipso facto illegal under Federal law but such partnerships must be shown to be accompanied by investment of capital, participation in management, rendition of services by the family partners or by such other indicia as will definitely demonstrate the actuality, the reality, and the bona fides of the arrangement."

benefit of the partnership, with no thought of income taxes and no purpose to evade, divide, or defeat their collection.

The judgment of The Tax Court is, therefore,

Reversed.

JUDGMENT

Extract from the Minutes of June 30th, 1948

No. 12232

W. O. CULBERTSON, SR., and GLADYS CULBERTSON

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of W. O. Culbertson, Sr., and Gladys Culbertson for a review of a decision of the Tax Court of the United States, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said Tax Court in this cause be, and the same is hereby, reversed.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 181 to 194 next preceding this certificate, contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 12232, wherein W. O. Culbertson, Sr., and Gladys Culbertson are petitioners, and Commissioner of Internal Revenue is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 180 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of September, A. D. 1948.

Oakley F. Dodd, Clerk of the United States Court of Appeals, Fifth Circuit. (Seal.)

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Supreme Court of the United States

No. 313, October Term, 1948

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

vs.

W. O. CULBERTSON, SR. AND GLADYS CULBERTSON

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 313

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

W. O. CULBERTSON, SR., AND GLADYS CULBERTSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit, entered June 30, 1948, reversing the judgment of the Tax Court.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 31-56) is not reported. The opinion of the Court of Appeals (R. 181-188) is reported in 168 F. 2d 979.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1948 (R. 188). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the court below departed from the decisions of this Court in *Commissioner* v. *Tower*, 327 U.S. 280, and *Lusthaus* v. *Commissioner*, 327 U.S. 293, in reversing the Tax Court's decision that business income attributed by taxpayer [1] to his four sons as "partners" was includible in taxpayer's gross income as defined in Section 22 (a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 18-19.

STATEMENT

The material facts as found by the Tax Court (R. 32-56) may be summarized as follows:

Prior to the taxable years (1940 and 1941), taxpayer and one Coon carried on a cattle raising business as equal partners, under the firm name of Coon and Culbertson. Taxpayer had four sons and a daughter—W. O., Jr., Richard, Joe, Eugene, and Fannie—whose respective ages at the beginning of 1940 were 24, 22, 18, 16, and 14. W. O., Jr., finished college in 1938 and became foreman of the ranch for Coon and Culbertson, in which capacity he received $100 per month and board. Richard finished college in 1940 and went directly into the

[1] The term "taxpayer", whenever appearing herein, refers to respondent W. O. Culbertson, Sr. His wife, Gladys Culbertson, is a party only because the income tax returns for the taxable years involved were filed on the community property basis. She filed a separate petition to the Tax Court, and the cases were consolidated for hearing and disposition below. (R. 31, 59-60.)

army. Joe was attending college in 1940, interrupted his studies to enter the army, and at the time of the hearing below had returned to college to finish his studies. Eugene was attending a business school. Fannie was an assistant in a dry goods store. Ever since the boys were about twelve years old they had done odd jobs on the ranch during summer vacations and week ends. (R. 32-33, 44.)

In the spring of 1939, taxpayer and Coon decided to dissolve their partnership and sell the herd, and by October of that year the herd had been reduced to about 1,500 head of cattle. Taxpayer then offered to purchase the remainder of the herd for about $65 per head, and Coon accepted his offer provided taxpayer would sell an undivided one-half interest to his sons at the same price. On November 4, 1939, taxpayer purchased the cattle then owned by the business for $99,440. Two days later, he executed a bill of sale to his four sons, covering an undivided one-half interest in the same cattle, in exchange for a one-year note from the sons for $49,720. (R. 33-34.) A bank account was then opened in the name of "W. O. Culbertson and Sons" (R. 35), and, shortly thereafter, taxpayer sought to borrow funds on behalf of this new "partnership" from the National Finance Credit Corporation. A representative of that company advised taxpayer to have appropriate documents prepared authorizing him to act for his minor sons. Taxpayer thereupon explained the

new "partnership" to his attorney, who prepared a document (dated December 8, 1939, and to become effective as of January 1, 1940) conveying an undivided one-eighth interest in the business assets to each of his four sons. Taxpayer read, understood, and signed this document, and its pertinent portions are quoted in the Tax Court's findings (R. 36-40.) It recited that taxpayer and his wife were "the owners" of the business assets and wished to create a "limited partnership" with the sons "as and when they arrive at a proper age to engage in business"; and provided that the transfer was subject to certain "conditions", including the condition that the "grantors" reserved the right "to manage and control the property herein conveyed, without restrictions and in such manner as may by them be deemed proper" until the youngest son reached 21 years of age (R. 36-38). A new note dated January 1, 1940, in the amount of $57,674.80, was given to taxpayer by his sons for their one-half undivided interest in the entire business, in lieu of the $49,720 note they had previously given him for a one-half interest in the cattle alone (R. 34). Thereafter, taxpayer executed another document, dated December 31, 1940, purporting to convey an additional undivided one-eighth interest in the business assets to his daughter Fannie, subject to the same conditions contained in the prior conveyance to the sons. The daughter gave him a note for $13,488.27 for her interest. (R. 40-42.) On or before June 10, 1941, the new "partnership" borrowed $60,000 from

the National Finance Credit Corporation, which was turned over to taxpayer. The loan was handled exclusively by taxpayer, and was repaid with proceeds of the business. (R. 42.)

The notes given to taxpayer by his children were never paid by them. The daughter's note was satisfied by a credit of the full amount as a gift to her from taxpayer (R. 42). As for the sons' note, $30,000 of it was paid with the funds borrowed by taxpayer on behalf of the partnership, $21,744.80 was credited as gifts from taxpayer to the sons, and the balance ($5,930) was credited as an overcharge (R. 34-35, 42, 48). Taxpayer did not intend that the notes be paid, and the children contributed no capital of their own to the business (R. 47-49). No capital accounts for the children were set up on the books of the business (R. 44, 53).

The children contributed no vital additional services after formation of the alleged partnership (R. 49-50, 54). The eldest son, W. O., Jr., continued to serve as foreman of the ranch under the same arrangement as previously existed when the business was owned by Coon and Culbertson (R. 35). He was the only child who was rendering any kind of services at the time of the hearing below (R. 44), and he was paid both before and after formation of the alleged partnership at about the same rate for about the same services (R. 33, 50). Joe and Eugene were still pursuing their studies, while Richard went directly from college into the

army; they were paid wages for their services during summer months (R. 44). Taxpayer ran the office of the business and continued as before to manage the financing, sales and purchases, visiting the ranch about once a month (R. 44, 54). He withdrew no salary for his services (R. 44).

Partnership returns filed for the years 1940 and 1941 reported net income of $19,064.21 for 1940 and $63,801.33 for 1941. The 1940 net income was declared distributable to taxpayer and his sons as partners; the 1941 net income was declared distributable to taxpayer, his daughter, and his sons as partners. The 1940 return stated that the partnership was formed on January 1, 1940, while the 1941 return stated that the partnership was formed on January 1, 1941 (R. 42-43). In 1943, after a revenue agent questioned the returns, taxpayer, upon the advice of his accountant and his attorney, caused a petition to be filed in a Texas district court in the name of his sons and daughter, against himself and his wife as defendants, for a declaratory judgment that the children were partners. Except for his attorney and the court officials, taxpayer was the only person present at the hearing. The state court entered a decree to the effect that taxpayer's conveyances of partnership interests to his children, on December 8, 1939, were void, but that the children were valid partners (R. 44-45).

The Commissioner determined that taxpayer's children were not his partners for federal income

tax purposes, and that the shares of the 1940 and 1941 business income attributed to them were includible in his gross income (R. 23-27). At the hearing before the Tax Court, taxpayer conceded the correctness of the Commissioner's determination as to the daughter (R. 115, 123, 126). The Tax Court, relying on *Commissioner* v. *Tower*, 327 U. S. 280, and *Lusthaus* v. *Commissioner*, 327 U. S. 293, held that the sons did not become real partners and sustained the Commissioner's determination that the shares of the business income ascribed to and reported by them were likewise taxable to taxpayer (R. 46-56). The Court of Appeals reversed. (R. 188).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding, contrary to the decisions of this Court in *Commissioner* v. *Tower*, 327 U. S. 280, and *Lusthaus* v. *Commissioner*, 327 U. S. 293, that the claimed partnership between taxpayer and his sons was entitled to recognition for federal income tax purposes irrespective of whether the sons had contributed capital of their own or vital additional services to the business.

(2) In reversing the judgment of the Tax Court.

REASONS FOR GRANTING THE WRIT

1. This case reflects an alarming tendency by some of the Courts of Appeals to circumvent the decisions of this Court in *Commissioner* v. *Tower*, 327 U. S. 280, and *Lusthaus* v. *Commissioner*, 327

U. S. 293. Since those cases were handed down, the Tax Court has consistently applied the criteria there prescribed in passing upon the reality of claimed family partnerships for federal income tax purposes. In keeping with this Court's admonition that each case in this field must turn on its own facts, the Commissioner has not appealed from Tax Court decisions adverse to him; on the other hand, when the Commissioner's determination has been sustained, the taxpayers, in numerous instances, have sought further review. The case at hand represents the latest example in a series of recent cases in which the Tax Court has followed the *Tower* and *Lusthaus* principles, only to have its decision reversed on the taxpayer's appeal.[2] On each prior occasion, the Government has refrained from requesting certiorari, in the expectation that the decision would not serve as an invitation to repeated deviations by the Courts of Appeals from the controlling principles enunciated by this Court. It is now apparent from the decision of the court below that, far from abating, the trend illustrated by these decisions has accelerated to the point of flagrant disregard of those principles. A great many family partnership

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[2] *Lawton* v. *Commissioner*, 164 F. 2d 380 (C.C.A. 6th); *Weizer* v. *Commissioner*, 165 F. 2d 772 (C.C.A. 6th); *Woosley* v. *Commissioner*, 168 F. 2d 330 (C.C.A. 6th); *Canfield* v. *Commissioner*, (C.C.A. 6th), decided July 12, 1948 (1948 C.C.H., par. 9337); *Simmons* v. *Commissioner*, 164 F. 2d 220 (C.C.A. 5th); *Singletary* v. *Commissioner*, 155 F. 2d 207 (C.C.A. 5th); *Wilson* v. *Commissioner*, 161 F. 2d 661 (C.C.A. 7th); *Durwood* v. *Commissioner*, 159 F. 2d 400 (C.C.A. 8th).

cases are pending, and unless the trend is halted, serious loss of revenue will ensue. The orderly administration of the tax laws in this field as in others is dependent upon faithful adherence by the several Courts of Appeals, no less than by the Tax Court, to the authoritative rulings of this Court. Once an important question has been resolved by this Court, the failure of some of the lower courts to abide by the result not only produces inequality of treatment among taxpayers, but engenders disrespect for the authority of this tribunal.

2. In the *Tower* and *Lusthaus* cases, this Court applied the *Earl-Clifford-Horst* line of cases[3] to partnerships predicated upon intra-family transfers of business assets. In the *Tower* case, a gift by a husband to his wife of a portion of his business capital was held ineffectual to render the wife his partner for tax purposes, notwithstanding the validity of the arrangement under state law and as to third parties; unless the donee-partner "invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things" (327 U. S. at p. 290), the Tax Court is fully justified in concluding that the claimed partnership lacks economic reality and that, accordingly, the business income is taxable in its entirety to the donor-husband. In the *Lusthaus* case, this Court held that no different

[3] *Lucas* v. *Earl*, 281 U. S. 111; *Helvering* v. *Clifford*, 309 U. S. 331; *Helvering* v. *Horst*, 311 U. S. 112.

result can obtain where the husband purports to sell some of his business assets to the wife, the consideration being paid partly with funds donated by him to her and partly out of the share of the business income ascribed to her as a partner. The principles underlying these decisions were reaffirmed in *Commissioner* v. *Sunnen*, 333 U. S. 591.

Applying the criteria laid down in the *Tower* and *Lusthaus* cases, the Tax Court concluded (R. 47-54) that taxpayer's four sons contributed no capital of their own nor any vital additional services (managerial or otherwise) to the business, and hence did not become his partners for tax purposes. The undisputed evidentiary facts not only support but demand that inference: Taxpayer purchased and paid for the interest of his former partner (Coon), and then purported to sell an interest to his sons in exchange for a note which he never expected or intended them to pay; the note was satisfied partly by direct gifts from taxpayer, partly with business funds borrowed by him, and partly by an overcharge credit (R. 34-40, 42, 48).[4] As for the services of the sons, two of them (Eugene and Joe, age 16 and 18) were still attending school at the time of their admission as partners, while another (Richard, age 22) was

[4] The sons acquired their interests from taxpayer in substantially the same manner as did his daughter (R. 40-42), to whom a share of the business income was also ascribed (R. 43) but who concededly (R. 115, 123, 126) did not become a partner for tax purposes.

just finishing college and went directly into the army; they had performed odd jobs for the business during summer vacations and week-ends, for which they were compensated, and they rendered no additional services after formation of the alleged partnership (R. 32-33, 44, 49-50). The eldest son (W. O., Jr., age 24) had become foreman of the ranch two years before his admission as a partner, and thereafter he continued to serve in the same capacity and for the same compensation; he was the only son who was performing any kind of services at the time of the Tax Court hearing (R. 33, 35, 44, 50). Taxpayer continued as before to run the office and to manage the financing, sales, and purchases (R. 44, 54). In all essential features, this case bears a marked similarity to the *Lusthaus* case, where the taxpayer "sold" an interest in his business to his spouse who thereafter continued to perform the same kind of services she had been performing. Here, as in that case (p. 297), "the partnership arrangements were merely superficial, and did not result in changing the [taxpayer's] economic interest in the business."

In reversing the Tax Court, the court below relied upon a conglomeration of reasons which, viewed singly or collectively, evince a complete misconception of the guiding principles:

(a) Insofar as its decision rests on the theory (R. 186) that a family partnership is "equally effective whether the capital and the services are presently contributed and rendered or are later to

be contributed or to be rendered", the court adopted a test repugnant to that prescribed in *Tower* and *Lusthaus*. The "basic question" is who "earned" the business income (*Commissioner* v. *Tower*, pp. 283, 289), not who expects to earn it. The creative source of the business income earned during the taxable years (taxpayer's capital and services) obviously did not change merely because the sons may have hoped to contribute capital or services in the future.[5] To hold that a taxpayer may split his business income with his children on the basis of a possibility that they might some day become his partners is to propound novel and dangerous concepts of tax liability.

(b) Insofar as its decision is grounded on the theory (R. 185, 187) that the original bill of sale from taxpayer to his sons was a "legal and binding document" under which the sons "owned" a one-half interest in the business, the court resorted to a formalistic test which was emphatically rejected in *Tower* and *Lusthaus*.[6] This Court's holding in

[5] Besides, even assuming that taxpayer's expectancy of new capital from the sons sufficed to make them immediate partners, nothing in the record or the Tax Court's findings warrants the appellate court's tacit assumption that the sons intended to contribute any new capital; on the contrary, as appears from its own restatement of the facts (R. 182-183), the sons' admission as partners was based on taxpayer's "sale" to them of an interest in the existing business assets.

[6] The court noted (R. 183), as the Tax Court had found, that taxpayer purchased and paid for Coon's interest in the business, that he in turn "sold" that interest to his sons, and that the note he took from the sons as payment was satisfied partly by gift from him and partly out of the business proceeds.

those cases that the incoming partner must actually contribute capital "originating" with him (or else "vital additional services") would be meaningless if, as the court below assumed, transfer of bare legal title to some of the capital suffices to make the transferee a genuine partner.

(c) Insofar as it proceeded on the theory (R. 185, 186-187) that the sons' military services rendered them partners, the court dispensed with the alternative requirement of "vital additional services." Granting *arguendo* that one who has already become a partner in the tax sense does not cease to be one if his services to the business are interrupted by service to his country, no such situation is here presented. At the time the sons purportedly became partners, three of them were still attending school; their education—not any vital services to the business—was interrupted by the war. As for the eldest son, he performed the same non-vital services before and after his admission as a partner, and it was not until after the taxable years that he entered military service. (R. 44, 49-50, 96.)[7] The decision of the court below with respect to the younger sons is nothing short of a holding that any youth attending school who contributes non-vital services to his father's business and plans

[7] In its opinion (R. 183), the court acknowledged that the sons' services "when they were not in school was disrupted by the War" and that at the time of the Tax Court hearing two of them "were still in school." Taxpayer testified (R. 126) that during the taxable years "all of the boys were in school except W. O. Jr."

to contribute vital services after his education is completed, must forthwith be deemed a partner in the business if his education is disrupted by war service. Its decision with respect to the eldest son is tantamount to a holding that non-vital services are transformed into vital services by virtue of subsequent war service. Surely war service cannot create a real partnership for tax purposes where none existed before. Where, as here, the claimed partners never contributed either new capital or vital additional services to the business, their military service furnishes no tenable basis for treating part of the business income as earned by, and taxable to, them.

(d) Insofar as it held (R. 185, 187) that the arrangement must be accorded tax effect because it was not motivated by tax avoidance objectives,[8] the court again misconceived the rationale of the *Tower* and *Lusthaus* decisions. The tax consequences flow from the economic substance of the arrangement, irrespective of the underlying motives. The existence of a tax avoidance motive simply lends "further strength" (*Commissioner* v. *Tower,* p. 289) to the inference that the claimed partnership is unreal. See also *Helvering* v. *Clifford,* 309 U.S. 331, 333, 335.

(e) Finally, to the extent that its reversal of the Tax Court's decision rests upon its determination (R. 187) that "the evidence shows conclusively

[8] The Tax Court made no finding one way or the other on this score.

that the partnership here was actual, real, *bona fide*", the court below ignored the uncontradicted evidence which impelled the Tax Court to infer otherwise. The most that could be said in taxpayer's favor is that conflicting inferences as to the reality of the arrangement might reasonably be drawn. But "Whether the evidence would have supported a different finding by the Tax Court is a question not here presented." *Commissioner* v. *Tower*, p. 292.

3. The decision of the court below not only is in conflict with this Court's decisions in the *Tower* and *Lusthaus* cases, but reflects a marked departure from the approach taken by other Courts of Appeals [9] and the Fifth Circuit itself [10] in the

[9] See, e.g., Second Circuit: *Seifert* v. *Commissioner*, 157 F. 2d 719; *Seibert* v. *Commissioner*, 156 F. 2d 227; *Miller* v. *Commissioner*, 150 F. 2d 823; *Waldburger* v. *Helvering*, 131 F. 2d 598; *Fletcher* v. *Commissioner*, 164 F. 2d 182, certiorari denied, 333 U.S. 855. Third Circuit: *Eisenberg* v. *Commissioner*, 161 F. 2d 506, certiorari denied, 332 U.S. 767; *Davis* v. *Commissioner*, 161 F. 2d 361; *Walker* v. *Commissioner*, 160 F. 2d 313; *Lusthaus* v. *Commissioner*, 149 F. 2d 232, affirmed, 327 U.S. 293; *Sweigard* v. *Commissioner*, 149 F. 2d 646. Fourth Circuit: *Wilson* v. *Commissioner*, 161 F. 2d 556, certiorari denied, 332 U.S. 769; *Mauldin* v. *Commissioner*, 155 F. 2d 666; *Hash* v. *Commissioner*, 152 F. 2d 722, certiorari denied, 328 U.S. 838, rehearing denied, 328 U.S. 879; *Economos* v. *Commissioner*, 167 F. 2d 165, petition for certiorari filed August 6, 1948. Sixth Circuit: *Hougland* v. *Commissioner*, 166 F. 2d 815, certiorari denied, 334 U.S. 846; *Dawson* v. *Commissioner*, 163 F. 2d 664; *Lowry* v. *Commissioner*, 154

[10] *Scherf* v. *Commissioner*, 161 F. 2d 495, certiorari denied, 332 U.S. 810; *Benson* v. *Commissioner*, 161 F. 2d 821; *Belcher*

direct wake of, and even prior to, this Court's *Tower* and *Lusthaus* decisions. If permitted to stand, it will encourage taxpayers' appeals in other family partnership cases, add new impetus to the more recent trend of appellate court reversals of the Tax Court's decisions in such cases, and seriously undermine this Court's decisions in the *Tower* and *Lusthaus* cases.

F. 2d 448, certiorari denied, 329 U.S. 725; *Lorenz* v. *Commissioner*, 148 F. 2d 527, certiorari denied, 327 U.S. 786; *Thorrez* v. *Commissioner*, 155 F. 2d 791; *Camfield* v. *Commissioner*, 154 F. 2d 1016; *Livie* v. *Commissioner*, 155 F. 2d 728; *Ewing* v. *Commissioner*, 157 F. 2d 679; *DeKorse* v. *Commissioner*, 158 F. 2d 801; *Greenberg* v. *Commissioner*, 158 F. 2d 800; *Schreiber* v. *Commissioner*, 160 F. 2d 108; *MacDonald* v. *Commissioner*, 165 F. 2d 213; *Epps* v. *Commissioner*, 164 F. 2d 482; cf. *Weinstein* v. *Commissioner*, 166 F. 2d 81. Seventh Circuit: *Appel* v. *Smith*, 161 F. 2d 121; *Tinkoff* v. *Commissioner*, 120 F. 2d 564. Eighth Circuit: *Doll* v. *Commissioner*, 149 F. 2d 239, certiorari denied, 326 U.S. 725; *Suporniek* v. *Commissioner*, 150 F. 2d 119; *Tyson* v. *Commissioner*, 146 F. 2d 50. Ninth Circuit: *Nordling* v. *Commissioner*, 166 F. 2d 703, petition for certiorari filed June 18, 1948; *Quon* v. *Commissioner*, 165 F. 2d 215, certiorari denied, 334 U.S. 845. Tenth Circuit; *Earp* v. *Jones*, 131 F. 2d 292, certiorari denied, 318 U.S. 764; *Grant* v. *Commissioner*, 150 F. 2d 915; *Bradshaw* v. *Commissioner*, 150 F. 2d 918; *Losh* v. *Commissioner*, 145 F. 2d 456.

v. *Commissioner*, 162 F. 2d 974, certiorari denied, 332 U.S. 824; *Mead* v. *Commissioner*, 131 F. 2d 323, certiorari denied, 318 U.S. 777; *Argo* v. *Commissioner*, 150 F. 2d 67, certiorari denied, 326 U.S. 762; *Sewell's Estate* v. *Commissioner*, 151 F. 2d 806, certiorari denied, 327 U.S. 805; *Sewell* v. *Commissioner*, 151 F. 2d 765, certiorari denied, 327 U.S. 783; *Dawes* v. *Allen*, 157 F. 2d 518; *Blalock* v. *Allen*, 151 F. 2d 927; *Morton* v. *Thomas*, 158 F. 2d 574, certiorari denied, 330 U.S. 834.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER, 1948

APPENDIX

Internal Revenue Code:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * * tax * * *.
(26 U. S. C. 1946 ed., Sec. 11.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.
(26 U.S.C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).
(26 U. S. C. 1946 ed., Sec. 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3797.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.22 (a)-1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, * * *.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 313

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

W. O. CULBERTSON, SR., AND GLADYS CULBERTSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

The Government's position is adequately set forth, we think, in the petition for certiorari, and will not be restated here.

However, we wish to say an additional word as to the significance of this case. The reason for granting certiorari is far more important than the case itself. Several years ago, this Court, in *Commissioner* v. *Tower,* 327 U. S. 280, and *Lusthaus* v. *Commissioner,* 327 U. S. 293, laid down the principles to be followed in the so-called family partnership cases. It was obvious that no two family partnerships would be exactly alike, and that it would therefore be necessary for the lower courts to apply these principles to the facts of specific cases. A large number of such cases did come before the Tax Court. Where the Tax Court's decision in the application of these prin-

ciples to the facts of a particular case was adverse to the Government, the Commissioner did not appeal. On the other hand, taxpayers in many such cases have continuously sought reversal of Tax Court decisions adverse to them. Although such appeals have generally been futile (see footnotes 9 and 10, pp. 15–16 of the petition for certiorari herein), there has been an increasing tendency in several circuits to re-examine the facts and to reverse decisions of the Tax Court which, in our judgment, correctly applied the principles of the *Tower* and *Lusthaus* cases to the specific factual situations involved.[1]

The Government is not asking the Court to announce any new rules. It merely asks the Court to reaffirm the principles established in the *Tower* and *Lusthaus* cases. Since the facts of each family partnership case differ in some respect from the facts of every other family partnership case, including the *Tower* and *Lusthaus* cases the nselves, it is always possible to focus upon such differences and, by exaggerating their importance, to attempt to spell out different legal principles based upon those factual differences. Such was the technique employed by the Court of Appeals in reversing the

[1] See Pet. 8, footnote 2. In addition to the cases there cited, the following decisions rendered during the past few months represent further instances in which the courts of appeals have reversed the Tax Court, unjustifiably, we think, in family partnership cases: *Kent* v. *Commissioner*, 170 F. 2d 131 (C. A. 6); *Hartz* v. *Commissioner*, 170 F. 2d 313 (C. A. 8); *Walsh* v. *Commissioner* (C. A. 8), decided November 12, 1948, 1948 C. C. H., par. 9403; *Graber* v. *Commissioner* (C. A. 10), decided November 12, 1948, 1948 C. C. H., par. 9409.

judgment of the Tax Court herein. But the Tax Court had properly appraised the facts of this case in the light of the *Tower* and *Lusthaus* decisions, and it is important to the orderly administration of the tax laws that the correct application of established legal principles by the Tax Court to the facts of a particular case be not upset upon the ground that certain relatively unimportant factual differences require a different result. The *Tower* and *Lusthaus* decisions made it clear that where the new partners contribute neither vital services nor capital originating with them, the allocation of profits under the so-called partnership is not conclusive for federal income tax purposes. The Tax Court recognized this basic principle and correctly applied it to the facts of this case. As was pointed out in detail in our petition for certiorari herein (pp. 11–15), the purported differences between this case and the *Tower* and *Lusthaus* cases do not call for any different rule of law and certainly do not justify appellate reversal of the Tax Court's judgment.

Respectfully submitted.

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NO. 313

313

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

COMMISSIONER OF INTERNAL REVENUE

v.

W. O. CULBERTSON, SR.

AND

GLADYS CULBERTSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The memorandum opinion of the Tax Court (R. 115, 142) is not officially reported. The unanimous opinion of the Court of Appeals (R. 181, 188) is reported in 168 F. 2d 979.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1948 (R. 188). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Question Presented

Did the Court of Appeals err in holding that Respondent Culbertson was not to be taxed upon the profits of a partnership interest formerly belonging to one Coon—unrelated to the Culbertsons—who had retired from the partnerhip of Coon & Culbertson upon condition that the Culbertson boys acquire his interest, take his place in the partnership, and carry on the cattle breeding program he had originated thirty-seven years previously.

Statutes And Regulations Involved

These are set out in the Appendix, *infra*, pp. 19-20.

Statement

The controlling and undisputed facts, which distinguish this case from other family partnership cases cited by Petitioner are, in summary: the interest in the partnership property producing the income Petitioner seeks to tax to Respondent Culbertson did not come from Respondent—as was true in the *Tower* and *Lusthaus* cases—but from Respondent's original partner, one R. S. Coon, unrelated to the Culbertson family; the transactions which Petitioner seeks to treat as tax-motivated transfers from a parent to his children were in reality transfers from Coon; the result, from the standpoint of the Culbertson family, was to increase, rather than decrease, tax liability and taxable income. Briefly, the pertinent facts are these:

R. S. Coon, unrelated to the Culbertsons, wealthy, childless, and eighty, after having spent forty years (twenty-five with Respondent in the equal partnership of Coon & Culbertson) in building a superior strain of Hereford cattle, the cream of which was included in 1939 in the partnership brood herd, was directed to retire from business activities and the partnership was put in liquidation (R. 72, 74, 135). Practically all partnership cattle (including "grade" and Brafords), except the brood herd, were sold in due course (R. 74, 103). When the time came to dispose of that herd,[1] in October 1939, Coon rejected Respondent's offer to buy the Coon interest for his own account, but proposed to sell to Respondent, at what clearly was a bargain price,[2] on condition that Respondent would transfer this interest at the same price to Respondent's four sons and allow them to step into his shoes in the partnership.[3] Respondent and

[1]Coon was intensely interested in the continued upbreeding of the brood herd and concerned about its future; he considered Respondent too old to carry out that program alone; and he concluded that the Culbertson boys were the appropriate persons for that task because of age (W. O., Jr., who was twenty-four years old in 1940 and married, Richard, twenty-two and married, Joe Jack eighteen, and Eugene sixteen (R. 92)) and ability (R. 75, 106). From the time each was twelve; the Culbertson boys had worked on the ranch when not in school, a practice which was continued until they went into the Army in 1941 and 1942 (R. 74, 87). All were man-sized, capable of doing a full ranching day's work and entirely familiar with all phases of cattle raising (R. 73, 74, 87, 93).

[2]This price was the average per head price of all prior sales, which included sales of registered Herefords, grade cattle and Brafords (R. 73, 81).

[3]Every person present at the time of this transaction, living at the time of trial, so testified: (R. 72-3; R. 75; R. 90, 107).

the Culbertson boys accepted this proposal,[4] and with the interest so acquired from Coon, the Culbertson boys entered into a partnership (W. O. Culbertson & Sons)[5] with their father, the interest of the Culbertson boys (one-eighth each) aggregating one-half and Respondent's interest continuing to be, as it had been with Coon, one-half. It is the profit from the former Coon interest, arising from sales of cattle,[6] which Petitioner seeks to tax to Respondent.

Another somewhat unusual fact (one to which Petitioner and the Tax Court attached great and—we believe with the Court below—undue importance) is that, after appropriate conveyances from Coon via Respondent to the Culbertson boys,[7] and after W. O. Culbertson & Sons had begun operating,[8] Respondent,

[4]"Well, son, Mr. Coon wants to sell his interest in the cattle to you four boys" (R. 107).

[5]All were to share in profits according to their ownership; "no individual to have any more right than the other but we'd all have the right to manage the ranch" (R. 90, 108).

[6]In 1940 and 41 all of the partnership income was from cattle (R. 95). The partnership owned no land (R. 102).

[7]At the instance of W. H. Coon (R. 76, 107), R. S. Coon's nephew and local manager, rather than Coon conveying directly to the boys, the partnership of Coon & Culbertson conveyed the full title to Respondent and Respondent conveyed an undivided one-half interest to the Culbertson boys, with no strings attached, the latter giving Respondent a joint note, later increased when additional cattle and the ranch equipment were purchased, due in one year with four per cent interest (R. 76, 92, 109). No gift was intended and it was definitely understood that the note was to be repaid (R. 90, 92, 109).

[8]The formation of W. O. Culbertson & Sons was widely publicized (R. 77, 135). The Coon & Culbertson certificate of membership in the American Hereford Association was trans-

at the instance of the manager, Wright, of the finance company which had previously extended credit to Coon & Culbertson and from which W. O. Culbertson & Sons was seeking an indispensable continuance of this credit, executed an instrument which, if it can be classified, may be called a conveyance of the property which had already been unconditionally conveyed to the Culbertson boys, and a limited partnership with respect to the ordinary partnership previously formed by Respondent and his sons.[8] This instrument, the terms of which were formulated without suggestion from Respondent, was furnished to the credit company and satisfied it (R. 114,115). The provisions of this instrument to which the Tax Court and the Petitioner attach great importance, are those which purport to place in Respondent a very large measure of control over the joint affairs. But the undisputed evidence established that Respondent did not dictate or suggest the terms of the instrument (R. 114), that

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ferred to W. O. Culbertson & Sons (R. 77, 110), partnership books were established and a bank account opened upon which all partners could check (R. 93, 94, 101), and in November 1939, the new partnership took possession of the cattle (R. 75).

[8]Wright directed Respondent to get a lawyer to draw up a paper which would enable the partnership to pledge the interest of the two minor sons in the cattle as security for loans; Respondent turned the matter over to the local Dalhart, Texas lawyer, Stallcup, and that lawyer, on his own initiative, drew up a document dated December 8, 1939, which Respondent signed, after it was read to him, and sent to Wright (R. 113, 115).

while it was read to him he did not appreciate its meaning,[10] that it was executed without the knowledge, consent or joinder of any of the Culbertson boys (R. 96,126) and it remained unknown and unnoticed until Respondent displayed it to an Internal Revenue Agent (R. 115, 116); whereupon, in an appropriate suit brought by the Culbertson boys at the suggestion of an accountant procured by Wright of the credit company, it was declared void *ab initio* (R. 96, 116, 145). The Court below refused to attach any significance to this document, holding in substance that the prior completed conveyance and partnership agreement could not be set aside by such ex parte action and instrument (R. 185).

Other factors of more or less significance in this father-sons partnership are:

The father, upon inquiry from the sons, agreed to and did finance the purchase (R. 88, 98, 107), paying Coon in cash and taking his sons' joint note for the equivalent amount, the note being later increased to $57,674.80 when the new partnership purchased the ranch equipment (R. 93); the father forgave in later years approximately two-fifths of this note and the

[10]Respondent, whose schooling had ended at the eighth grade, thought the paper was something necessary in connection with loans and did not realize that it might affect the partnership until so advised by an Internal Revenue Agent several years later (R. 115, 127), and for that reason he did not advise the Culbertson boys of its existence until 1943, when all of the boys were in the Army (R. 96, 116, 126); it was never filed of record, none of its terms were ever carried out and, other than sending it to the credit company, no use was made of it (R. 115, 127).

Remainder was paid to Respondent from the sons' shares of partnership profits (R. 96, 129). This financing was not essential to the program: Coon, who had sent the two eldest Culbertson boys through Animal Husbandry courses in college and left money at his death in 1943 for the college educations of the younger sons (R. 86, 104), volunteered to carry them for the purchase price (R. 91).

The sons were active in the business[11]—in which each had been trained since early childhood—except when their activities were interrupted by school attendance and military service (R. 95, 103, 110). The younger sons' absence for educational purposes was in furtherance of a longe range program[12] in which the sons agreed to equip themselves to carry on the business more effectively and return

[11]By the partnership agreement, Respondent—who had sustained a broken hip and was unable to do ranch work and hence lived in Dalhart, Texas, some ninety miles from the leased ranch—was to be primarily responsible for maintaining contacts with the partnerships' customers, selling cattle and arranging loans (R. 97, 100). W. O., Jr., who by experience and education was eminently fitted, was to have general supervision of all cattle raising and ranching activities and, in addition, was to be primarily responsible for perhaps the most vital phase of the business—breeding (R. 79, 95).

[12]Shortly following the formation of the partnership it was agreed that the younger brothers would best serve the partnership by completing their educations and thus equipping themselves to handle special phases of the business and, in the meantime, to devote their free time under the supervision of W. O. Jr., to necessary ranch work, tattooing, and maintaining the voluminous and meticulous records necessary in the certification of blood lines of all offspring (R. 94). During the tax years these plans were carried out—Respondent and W. O.

to it. The partnership was not a temporary affair (R. 78, 106) and the burden of personal services could be expected to change from year to year.

The father did not dominate partnership activities; he did not attempt to dictate the policies or direct the operation of the ranch and, in fact, he went to the ranch only about once a month (R. 95, 111, 129). Each son was a true partner and many of the more vital phases of the business were under the direct and exclusive control of one or more of the sons—ranch supervision, identifying offspring, maintenance of blood lines records, etc. (R. 85, 94, 95, 111).

Respondent, in late 1940, sold a one-eight interest out of his one-half interest to his daughter, Fannie, taking her note which was later forgiven as a gift. Respondent did not and does not claim Fannie as a partner for tax purposes.

In all of the transactions involving the sales of the cattle and the formation of the partnership, taxes were never mentioned, nor did taxes have a bearing upon what was done; no attorney or accountant was consulted; Respondent did not realize that tax considerations would be important (R. 80, 97, 112). Other than by signing income tax returns prepared by others, Respondent had had no tax experience (R. 111).

Jr. working full time, and the other three boys during weekends and in the summer (R. 95, 103, 110, 118)—until interrupted by the war.

As Petitioner makes no contention that the evidence fails to support the action of the Court of Appeals, and as this was a father-son partnership of the type so well known and traditional in the cattle business,[1] it is considered unnecessary to further summarize the details of the partnership's operations as shown by the evidence.

Argument

1. In urging that the decision of the Court of Appeals is wrong and repugnant to the *Tower* and *Lusthaus* cases, the Government is put in the unsupportable position of having to rely upon what it claims is void. For its petition to have any standing, the Government must establish that, but for the partnership it decries, Respondent would have been taxable on the income from that interest. The record gives no support for its position—even speculatively. The controlling facts are not contradicted: (1) The income in question—one half of the total partnership income— came from the one-half interest formerly belonging to Coon; (2) Prior to the October, 1939 transaction, Respondent had no interest in Coon's one-half interst; (3) Respondent tried to purcase Coon's int. rest for his own account

[1] Wright testified that in his experience, one out of every ten cattle partnerships was a father and son arrangement; that such partnerships are traditional in the cattle business because the joinder of youth and age supplies the prerequisites—physical hardihood and judgment; that, as confidant and adviser to cattlemen, he constantly recommends father and son partnerships with attendant purchases on time or gifts because this step strengthens the business and opposes the trend of young men going to urban employment (R. 81, 84).

and failed; (4) Respondent took temporary title to Coon's interest, as a conduit, charged with the obligation to pass it on to his sons, and when he passed it on and engaged in the resulting partnership he merely fulfilled a binding obligation; Respondent was never morally or legally a true owner of the Coon interest; (5) The Coon-Culberson contract is not divisible into a purchase by Respondent and a conveyance by him to his sons—for Coon conditioned the former upon the occurrence of the latter—but if it should be divided, then the avoidance of one part nullifies the other. If this partnership had not been organized there is no circumstance indicating that Respondent would have owned or been taxable upon the income from the Coon one-half interest. The case, from the standpoint of the Culbertson family, is not one of splitting income, but of the acquisition of additional property and income. The *Tower* and *Lusthaus* cases deal only with partnerships which attempt the division of income, formerly accruing to one member of the family, between two or more of its members, with the result, usually intentional of decreasing income tax liability, with no substantial change in the practical economic situation—of the family as a group or in the control of the partnership. The present case is the exact opposite. When a father, in an arm's length, good-faith transaction, assists his sons in purchasing property from someone entirely outside the family, *Tower* and *Lusthaus* do not make him liable for taxes upon the income from the property so purchased by the sons.

Nevertheless, Petitioner urges that Respondent, having paid for the Coon interest initially and not

having been reimbursed in the manner the Government conceives necessary under the *Tower* case, should be taxed upon the income from the Coon one-half interest in the cattle; but this ignores the distinguishing facts heretofore mentioned and it misconceives the true meaning of these cases. The crux of the *Tower* and *Lusthaus* cases is that a real partnership—a genuine union motivated by substantial business reasons and having economic substance—will be recognized taxwise as well as otherwise, and a partnership lacking such reality will not shield the true owner of the income from taxes; in the process of developing this central principle, the court in those cases gave consideration to factors usually indicating the presence or absence of the required reality—the artificiality of the arrangement, contributions of capital, participation in managerial functions, rendition of vital services and tax motivated diversion of income. The Court was not writing a statute and obviously the factors mentioned were not intended to be all inclusive. While this case does not fall in the *Tower-Lusthaus* catagory, W. O. Culberson & Sons was and is a real partnership; that this partnership was a genuine union motivated by substantial business and economic reasons is indicated not only by the manner of its creation, but by the partners' "conduct in the execution of the partnership provisions":[14] the Culbertson boys

[14]In the typical family partnership case the vital question is, "* * * whether the partners really and truly intend to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their agreement, considered as a whole, and by their conduct in execution of its provisions". *Commissioner* v. *Tower*, 327 U. S. 280 at 287.

made this partnership possible and their participation is, therefore, hardly less than vital. Whether it be labeled new capital or management participation or vital services, the Culbertson boys had enough to contribute to this partnership to cause R. S. Coon, who was in a better position to know than any one excepting perhaps Respondent, to refuse to part with his interest unless the Culbertson boys acquired that interest and took his place in the partnership. The Culbertson boys made very significant contributions: the uncontradicted testimony is that all policies were established by consultation with all partners and that Repondent did not attempt to vary the joint decisions as, indeed, he had no right to do. Of the two large functions—office work and ranch work—ranch work was basically the most essential; it is undisputed that Respondent did none of the ranch work, which was the province of the Culbertson boys; the Culbertson boys kept the breeding records and perhaps the one most essential element necessary to keep this particular business going, the breeding program, was handled exclusively by W. O., Jr., who devoted all of his time to managing the ranch. The younger brothers did not devote their whole time specifically to ranch work, but the reasons for this were entirely disassociated with the elements of a sham partnership: the partners agreed that the interests of the partnership would best be served by completing their educations and thus equipping themselves to handle the affairs of the partnership. During the tax years the younger boys worked for the partnership or served in the Army. In view of the manner in which

this partnership came into being and thereafter operated, to urge that Respondent earned the income involved in the tax years—by assisting his sons in buying out his original partner and by handling part of the office work and going to the ranch once a month—or to say that the Culbertson boys did not perform vital services or substantially contribute to the control and management of the business—demonstrates at least an inadequate understanding of the ranching business. The fact that in seeking financial assistance for the partnership Respondent, without the knowledge or agreement of the other partners, executed a void document which contained ineffective and untrue recitations does not destroy the *bona fides* of the previously valid partnership; nor is the reality of this partnership weakened in any way by the fact that a year and a half after the partnership had been in operation the Respondent, of his own initiative, forgave approximately two-fifths of the boys' note.

2. There is no tendency on the part of the Courts of Appeal to disregard the principles of the *Tower* and *Lusthaus* cases. As this Court admonished, family partnership cases—the overwhelming majority of which are husband and wife arrangements—turn on the particular facts of each case and it is, therefore, to be expected that some cases will fall on one side of the line and some on the other. But when the same Court of Appeals composed of the same Judges decides family partnership cases on the ratio of two or three or more to one in favor of the Government— and

this generalization appears to hold for practically all the Courts of Appeal—it is quite difficult to perceive any basis upon which the Petitioner can complain, supportably, of a tendency to misconstrue the principles of the *Tower* and *Lusthaus* cases against the Government. Petitioner cites as evidence of the asserted tendency four cases from the Sixth Circuit,[15] two from the Fifth Circuit,[16] and one each from the Seventh[17] and Eighth[18] Circuits, all of which were decided in 1946, 1947 and 1948; but during this same period of time, the Sixth Circuit decided fifteen family partnership cases[19] for the Government—and a combination of Judges Hicks, Allen, Martin, Simons and Miller decided all nineteen cases; the Fifth Circuit decide five;

[15] *Lawton* v. *Commissioner*, 164 F. 2d 380; *Weizer* v. *Commissioner*, 165 F. 2d 772; *Woosley* v. *Commissioner*, 168 F. 2d 330; *Canfield* v. *Commissioner*, decided July 1948.

[16] *Simmons* v. *Commissioner*, 164 F. 2d 220; *Singletary* v. *Commissioner*, 155 F. 2d 207.

[17] *Wilson* v. *Commissioner*, 161 F. 2d 661.

[18] *Durwood* v. *Commissioner*, 159 F. 2d 400.

[19] *Byerly* v. *Commissioner*, 154 F. 2d 879; *Houghland* v. *Commissioner*, 166 F. 2d 815, cert. den. 334 U. S. 846; *Dawson* v. *Commissioner*, 163 F. 2d 664; *Lowry* v. *Commissioner*, 154 F. 2d 448, cert. den., 329 U. S. 725; *Lorenz* v. *Commissioner*, 148 F. 2d 527, cert. den., 327 U. S. 786; *Thorrez* v. *Commissioner*, 155 F. 2d 791; *Canfield* v. *Commissioner*, 154 F. 2d 1016; *Livie* v. *Commissioner*, 155 F. 2d 728; *Ewing* v. *Commissioner*, 157 F. 2d 679; *DeKorse* v. *Commissioner*, 158 F. 2d 801; *Greenberg* v. *Commissioner*, 158 F. 2d 800; *Schreiber* v. *Commissioner*, 160 F. 2d 108; *MacDonald* v. *Commissioner*, 165 F. 2d 213; *Epps* v. *Commissioner*, 164 F. 2d 482; *Weinstein* v. *Commissioner*, 166 F. 2d 81.

cases[20] in favor of the Government; the Seventh Circuit decided one case[21] for the Government and one for the taxpayer; and the Eighth Circuit had only one case before it. During the same period the Second Circuit decided three cases[22] for the Government and none for the taxpayer, the Third Circuit decided three cases[23] for the Government and none for the taxpayer, the Fourth Circuit decided three cases[24] for the Government and none for the taxpayer, and the Ninth Circuit decided two cases[25] for the Government and none for the taxpayer. The tenth Circuit apparently has had no family partnership cases before it since the *Tower* and *Lusthaus* cases. According to the citator, the Tax Court has considered approximately 350 family partnership cases since the *Tower* case was decided in February, 1946; of these, approximately forty have been appealed and of the appealed cases only

[20] *Scherf* v. *Commissioner*, 161 F. 2d 495 cert. den., 332 U. S. 810; *Benson* v. *Commissioner*, 161 F. 2d 821; *Belcher* v. *Commissioner*, 162 F. 2d 974, cert. den., 332 U. S. 824; *Dawes* v. *Allen*, 157 F. 2d 518; *Morton* v. *Thomas*, 158 F. 2d 574, cert. den., 330 U. S. 834.

[21] *Appel* v. *Smith*, 161 F. 2d 121.

[22] *Seifert* v. *Commissioner*, 157 F. 2d 719; *Seibert* v. *Commissioner*, 156 F. 2d 227; *Fletcher* v. *Commissioner*, 164 F. 2d 182, cert. den., 333 U. S. 855.

[23] *Eisenberg* v. *Commissioner*, 161 F. 2d 506, cert. den., 332 U. S. 767; *Davis* v. *Commissioner*, 161 F. 2d 361; *Walker* v. *Commissioner*, 160 F. 2d 313.

[24] *Wilson* v. *Commissioner*, 161 F. 2d 556, cert. den., 332 U. S. 769; *Mauldin* v. *Commissioner*, 155 F. 2d 666; *Economos* v. *Commissioner*, 167 F. 2d 165, cert. pending.

[25] *Nordling* v. *Commissioner*, 166 F. 2d 703; *Quon* v. *Commissioner*, 165 F. 2d 215, cert. den., 334 U. S. 845.

nine, including the present case, were decided for the taxpayer. If the adjudicated cases evidence any trend or tendency it is certainly one of which Petitioner cannot complain.

A reading of the cases cited by Petitioner is the best evidence that the Courts of Appeals are endeavoring to follow and apply, rather than disregard, the principles enunciated in the *Tower* and *Lusthaus* cases.[26] Assuredly, the fact that the Government, being free to do as it pleased, did not appeal any of these eight cases, is quite immaterial.

The suggestion, implicit in the petition, of the need for a more definitive exposition of family partnership tax principles, if true, is being met legislatively. One purpose of the Revenue Bill of 1948—insofar as it authorized husbands and wives to divide their income for tax purposes[27]—was to allay family partner-

[26]In the *Lawton*, *Woosley* and *Canfield* cases, the Tax Court specifically had found that valid partnerships existed for tax purposes; in the *Simmons* case, the Circuit Court sustained the Tax Court as to the partnerships in which the husband had an interest and reversed only where the Tax Court had taxed partnership income to individuals who were not partners; in the *Singletary*, *Weizer* and *Wilson* cases, the Tax Court had found that the wife furnished capital originating with her and performed services; in the *Durwood* case, the partnership interest held by the questioned partner had not originated with the taxpayer. Citations, supra footnotes 15-18.

[27]Internal Revenue Code, Sections 12(d), 51(b). 26 U. S. C. A. Sec. 12(d) 51(b).

ship cases,[28] of which husband and wife arrangements constitute the overwhelming majority. Section 191 of H. R. 6712, the Revenue Revision Bill of 1948, as introduced in the House of Representatives by the Chairman of the Ways and Means Committee and unanimously ordered reported by the Committee on Ways and Means, contained specific and detailed provisions retroactive to 1940 governing the taxation of all family partnerships. This Bill was not reached by the last Congress, but according to the statements of the Chairman of the Ways and Means Committee appearing in the public press, it is to be reintroduced in the coming session.

CONCLUSION

The decision below is correct. It turns upon the particular facts of the case and presents no question calling for review by this Court. There is no conflict of decisions. The petition should, therefore, be denied.

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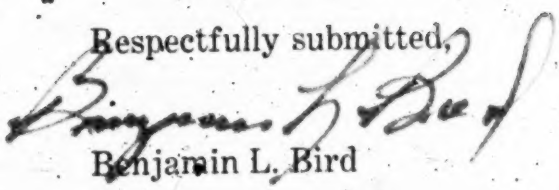
[28]Paragraph A, of Section VIII of the Ways and Means Committte Report No. 1274, H. R. 4790—the Revenue Bill of 1938—states:

"Adoption of these income-splitting provisions will produce substantial geographical equalization in the impact of the tax on individual net incomes * * *. The incentive for married couples in common law States to attempt the reduction of their taxes by the division of their income through such devices as trusts, joint tenancies, and family partnerships will be reduced materially."

Respectfully submitted,



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APPENDIX

INTERNAL REVENUE CODE:

Sec. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * *tax * * *.
(26 U.S.C. 1946 ed., Sec. 11)

Sec. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in the individual capacity.
((26 U.S.C. 1946 ed., Sec 181.)

Sec. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * * * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).
(26 U. S. C. 1946 ed., Sec. 182

Sec. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise

distinctly expressed or manifestly incompatible with the intent thereof—

(2) Partnership and Partner.—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * * * * * *

(26 U.S.C. 1946 ed., Sec. 3797.)

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1 Radkin & Johnson, Federal Income, Gift and Estate Taxes, pp. 907b and 907c 33

6 Mertens, Law of Federal Income Taxation, 1948 Cumulative Pocket Sup. p. 30 et seq 33

Robinson, "The Allocation Theory in Family Partnership Cases", 25 Taxes 963 33

118). In effect these transactions constituted a transfer from Coon to the Culbertson boys and all parties so understood (R. 75, 88, 98, 102, 106).

Initially Coon had directed his nephew, W. H. Coon, to close the deal for him (R. 75) and later he inquired whether his interest actually had been conveyed to the Culbertson boys (R. 76).

The organization of W. O. Culbertson & Sons was widely publicized in the Hereford business (R. 77). By letter of October 23, 1939 the National Credit Finance Corporation, the company theretofore handling Coon & Culbertson's loans, was notified of the dissolution of Coon & Culbertson, the organization of W. O. Culbertson & Sons and the fact that it would carry on Coon & Culbertson's business (R. 77, 81; Ex. 4, R. 136). The old Coon & Culbertson certificate of membership in the American Hereford Association, with offices at Kansas City was surrendered and on November 13, 1939 a new certificate issued to W. O. Culbertson & Sons changing the registration of the foundation herd (R. 77, 110; Ex. 7, R. 143). In the Dalhart *Texan* of December 2, 1939 the dissolution of Coon & Culbertson and the organization of the new partnership was featured (R. 77; Ex. 3, R. 135). A bank account was opened for the new partnership upon which all of the partners could check (R. 93, 95); partnership books were set up with entries for October and November 1939 (R. 93); as none of the partners knew what capital accounts were, no capital

accounts were included (R. 100, 101, 124, 131); stationery was printed containing the names of Respondent and the four boys and "W. O. Culbertson & Sons, Successors to Coon & Culbertson" (R. 110; Ex. 8, R. 144). No assumed name affidavit was filed of public record as the partners did not know one was required (R. 118, 127). W. O. Culbertson & Sons was not an assumed name. There being no partnership income for 1939 no partnership return was filed (R. 124). The 1940 partnership return contained a statement that the partnership was organized January 1, 1940; Respondent did not inspect this return, or any other return, and was not qualified to do so (R. 111).

After the formation of the partnership, its activities were systemized and plans laid for the future (R. 94). Partnership activities fell into two classifications — office work and ranch work (R. 91, 92); office work consisted of maintaining contacts with prospective customers, buying and selling cattle and arranging loans to carry on partnership operations (R. 92); it was agreed that Respondent, who could not do physical work due to an injured hip (R. 111) was to be primarily responsible for such work (R. 97, 103, 110, 118), although he regularly consulted with all partners with respect to such problems and all partners participated in the determination of partnership policies and major decisions (R. 98, 129). The cattle ranged over 52,000 acres of leased land (R. 102) and ranch work consisted of caring for the cattle — the establishment of a

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NO. 313

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

COMMISSIONER OF INTERNAL REVENUE
Petitioner

v.

W. O. CULBERTSON, SR.
AND
GLADYS CULBERTSON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Benjamin L. Bird
Counsel for Respondent

Of Counsel:
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COMMERCIAL RECORDER, FORT WORTH, TEXAS—1-30-49—100

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NO. 313

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

COMMISSIONER OF INTERNAL REVENUE
Petitioner

v.

W. O. CULBERTSON, SR.
AND
GLADYS CULBERTSON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Opinions Below

The memorandum opinion of Judge Disney of the Tax Court (R. 31-56) is not officially reported. The unanimous opinion of the Court of Appeals (R. 181-188) is reported in 168 F. 2(d) 979.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1948 (R. 188). Writ of certiorari was was granted on December 6, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTION PRESENTED

Did the Court of Appeals err in holding that Respondents Culbertson were not to be taxed upon the profits of a partnership interest formerly belonging to one Coon — unrelated to the Culbertsons — who had retired from the partnership of Coon & Culbertson upon condition that the Culbertson boys acquire his interest, take his place in the partnership, and carry on the cattle breeding program he had originated thirty-seven years previously.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, infra, pp. 49-52.

STATEMENT OF THE CASE

The petition for a writ of certiorari inadequately states the facts.

In 1902, R. S. (Uncle Dick) Coon began the breeding of pureblood Hereford cattle and it remained one of the engrossing interests of his life thereafter (R. 73, 74, 106). In 1915 Coon and Respondent[1] organized the equal partnership of Coon & Culbertson, operating in the Texas Panhandle and New Mexico (R. 71, 84), devoted to the breeding and sale of an outstanding type of registered Hereford (R. 72, 74).

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[1]As Gladys Culbertson does not figure in the facts, W. O. Culbertson, Sr. will be referred to as Respondent.

That partnership became famous because of the Domino Hereford blood strain in its cattle (R. 72; Ex. 3, R. 135). Because of Coon's wealth, this partnership, unlike many others, did not fail in the depression years (R. 107) and by 1939 it had several thousand head of registered Hereford cattle, unregistered Herefords, commercial or grade cattle, (R. 74, 85) Brafords (a cross between Brahmas and Herefords (R. 80)) and the usual accessories — horses and equipment — ranging and located on some 52,000 acres (82 square miles) of leased land in New Mexico (R. 102). The partnership owned no land (R. 102); Coon was engaged in many businesses (R. 72); Respondent's assets, other than his interest in Coon & Culbertson, were insignificant (R. 103, 127). In 1939 and later years Respondent lived in Dalhart, Texas some 93 miles from the ranch (R. 98, 103, 129). Coon was not related to the Culbertsons (R. 97).

Respondent's sons, W. O., Jr.,[2] Richard, Joe Jack and Eugene, were reared on the ranch and began ranch work at around twelve years of age doing all the kinds of work then available (R. 74, 85, 87). Until they went into the Army in 1941 and 1942 (R. 93, 100) their time was divided between going to school and working on the ranch (R. 79, 80, 93). Over the years Coon, who was childless (R. 71), took a great interest in their development and over Respondent's resistance (R. 97, 104) he sent W. O. and later Richard to Texas A. & M. College where they completed

[2]Hereinafter referred to as W. O.

Animal Husbandry courses (R. 72, 86, 87, 103); when he died in 1941 (R. 74) he left money by will to Joe Jack and Eugene to assist in their college educations (R. 103, 104). Upon graduation from college in 1938, W. O. became ranch foreman for Coon & Culbertson (R. 72, 86).

In the spring of 1939 Coon, because of his age and health (R. 71) was forced to retire from business and Coon & Culbertson was put into liquidation (R. 72, 74). During the liquidation the Culbertson boys contracted to purchase 350 head of Brafords but prior to delivery, one East offered to purchase them and the Culbertson boys, upon the advice of Coon, sold them to East at $5.00 per head profit (R. 86, 87, 99, 103). By October 1939 all of the partnership assets had been sold to third parties except the breeding herd of approximately 1400 head — the "cream of the crop" and the foundation of the famous Domino strain (R. 73, 74, 86) — several herd sires, a group of bulls and miscellaneous cows and the horses, equipment and grass leases (R. 92, 97, 99, 102, 103).

At this juncture Respondent offered to purchase Coon's interest in the breeding herd at a price equal to the average per head for cattle — registered, unregistered and commercial — previously sold (R. 72, 73, 106). On the night of the day the offer was made, Coon, Respondent, Williams, Coon's crony, and W. H. Coon, Coon's nephew and Panhandle representative, met at the Coon & Culbertson office in Dalhart and discussed the offer (R. 72, 75, 106, 127).

Coon was "very concerned about what would be done with these pure blood cattle" (R. 72); he anxiously desired the perpetuation of the blood lines of the foundation herd (R. 75) and realized that project to be a lifetime task (R. 75, 106). He thought Respondent was too old to carry the breeding program on alone but that Respondent and the Culbertson boys could accomplish the desired purpose (R. 75). Hence, after "We done a lot of visiting, talking about the herd and the hardships and hazards we'd went through" (R. 106), Coon did not accept Respondent's offer to buy, on his own account, Coon's one-half interest in the foundation herd, but proposed to Respondent to sell him his interest in that herd, at the specified price, provided Respondent would sell this one-half interest to the Culbertson boys at the same price and allow them to take his place in the partnership. (Williams (R. 72-3); W. H. Coon (R. 75, 78); Respondent (R. 107)). Apparently Coon had planned on the Culbertson boys acquiring his interest for some time and all parties understood that in reality Coon was selling his interest in the foundation herd to the Culbertson boys (R. 88, 98, 102, 107). The price specified was a bargain price (R. 88, 90, 91, 127).

Respondent advised Coon that he would discuss the proposal with the Culbertson boys (R. 75, 107) and on the next day he went to the ranch and told them, "Mr. Coon wants to sell his interest in the cattle

[1]Richard was then in Texas A. & M. College and was consulted later (R. 105).

to you four boys" (R. 88, 98, 107). The proposal was discussed and W. O. inquired how the purchase was to be financed and Respondent volunteered to help the boys out (R. 88, 118). It was agreed that the proposal would be accepted and, provided the boys acquired Coon's interest (R. 103), a partnership between the Respondent and the Culbertson boys, to be called "W. O. Culbertson & Sons" would be organized (R. 88, 98, 107) to which Respondent would contribute his one-half interest and each of the boys an one-eighth interest (R. 89, 90, 98, 103), and profits and losses were to be divided according to ownership (R. 90, 108) and "no individual was to have any more right than the other but we'd all have a right to manage the ranch" (R. 90).

Several days later W. O. discussed the purchase with Coon and thanked him for his offer and particularly for the bargain price at which the boys were acquiring his one-half interest; the new partnership and the financing of the boys' purchase were discussed; Coon told W. O. that he wanted the Culbertson boys to take over the herd and carry on the Domino strain of blood in the breeding of Herefords; Coon inquired if the boys had been able to finance their purchase and advised W. O. that if they ran into difficulties, he would handle the financing (R. 88, 90, 91).

Around November 1, 1939 the herd was tallied (R. 75; Ex. 4, R. 175). The conveyances took the form

of a bill of sale from Coon & Culbertson to Respondent and another from Respondent to the Culbertson boys, rather than a direct transfer from Coon to the boys, at the suggestion of W. H. Coon (R. 76, 107) because "our books were set up that way" (R. 76). On November 4, 1939 Coon & Culbertson executed a bill of sale to Respondent for 1,401 registered Hereford cows, heifers and calves, 32 registered Hereford bulls and Real Prince Domino 100th and Jayhawker Domino and Respondent gave Coon & Culbertson a check for $99,440.00 (R. 76, Ex. 1, R. 133). On November 6, 1939 Respondent executed and delivered to the four Culbertson boys, in the presence of W. H. Coon and a cattle inspector, a bill of sale to an undivided one-half interest in the same cattle, and the Culbertson boys executed and delivered to Respondent their promissory note for $49,720.00 — one-half of $99,440.00 (R. 76, 89, 109; Ex. 2, R. 134). The boys' note was due one year from date and bore four per cent interest (R. 89, 109). This was a transfer of the absolute title to an undivided one-half interest in the cattle to the Culbertson boys, there being no strings or conditions whatsoever attached to the bill of sale from Culbertson, other than the obligation of the boys to pay their note (R. 92, 109). While Respondent testified that, at the time, he gave no thought to whether the boys would be able to pay the note in one year (R. 118), he and the Culbertson boys understood that they had to pay the note (R. 89, 90, 92, 100, 109). In agreeing to finance the purchase by the Culbertson boys Respondent did not intend to make any gift (R.

feeding program, feeding, watering, calving, affording protection from the elements; hiring, firing, paying, feeding, housing and directing the activities of employees; maintenance of the ranch and equipment (R. 91, 92); and of prime importance to this partnership, the formulation and execution of a breeding program: the establishment of an objective — the type of animal to be produced — the selection of herd sires and cows which by conformation and blood lines were designed to produce calves approaching the objective, the segregation and mating of such selections, the indentification of offspring by ear tattooing, the maintenance of absolutely accurate records warranting the certification of the blood lines of each calf, and the acquisition of such certification from the Hereford Association (R. 85, 91, 94, 102). It was agreed that ranch work would be the province of the Culbertson boys (R.94) and W. O. was to become General Manager of the ranch (R. 78, 79, 110, 118, 130). It was agreed that the younger brothers would best serve the interest of the partnership by completing their educations and, in the meantime, working on the ranch under W. O.'s supervision at every opportunity (R. 80, 94), and upon graduation, each was to take charge of some certain phase of partnership activities (R. 94). By agreement of all partners, each partner was to draw what money he needed but all withdrawals were to be as nearly equal as possible (R. 95).

During the acquisition of Coon's interest and the formation of W. O. Culbertson & Sons, Respondent

requested W. H. Coon to open a line of credit with the National Finance Credit Corporation for the new partnership (R. 77). On October 23, 1939 W. H. Coon wrote A. A. Wright, Manager of the Credit Company, advising him of the liquidation of Coon & Culbertson and that W. O. Culbertson & Sons would take over the herd on November 1, 1939 and desired to establish a line of credit (R. 77; Ex. 4, R. 136). After this date and prior to December 8, 1939 (R. 84) Respondent advised Wright that he and his sons had organized a new partnership (R. 82) and that the new partnership desired a line of credit and when Wright ascertained that two of the parthers were minors he advised Respondent "In order for him to pass a loan with his company" for Respondent to have an attorney draw some kind of document which would be acceptable to the credit company's attorney (R. 81, 83, 113). The only thing Wright was interested in was for Respondent to have authority to sign for the minors (R. 83). Respondent took the matter to a local Dalhart attorney, Stallcup, advised him of Wright's suggestion and directed him to prepare a document to meet such suggestion (R. 113). Respondent did not instruct Stallcup as to any of the terms of the document. (R. 114, 115, 119-122). Stallcup prepared a document which Respondent signed (Ex. 5., R. 137). This document, dated December 8, 1939, purported to convey an undivided one-half interest in certain cattle, ranch equipment, leases and other property to the four Culbertson sons; it reserved to the grantors exclusive control and management of

the properties conveyed until the youngest son became twenty-one; grantors were not to be liable for losses arising from such management; none of the Culbertson boys could withdraw his interest in the properties; in the event of the death of one of them, without wife or child, his interest was to vest in the grantors, his brothers and sister and, if with surviving wife and child, in such wife and child. The document was sent to Wright (R. 115) and no further use was made of it except that when Respondent sold a part of his interest in the partnership to his daughter, Fannie, Stallcup drew another document referring to it (R. 116) because Fannie was a minor and Respondent thought some such document was necessary in connection with loans (R. 126). The December 8th document was not filed of record (R. 116); none of its terms were carried out (R. 116). One of the partnership duties which by agreement Respondent assumed was to handle partnership financing (R. 97, 128). In order to handle such financing, and for no other purpose, Respondent followed Wright's suggestion and had the document prepared, not for the purpose of reducing the partnership agreement to writing (R. 119) but for the sole purpose of enabling the partnership to borrow money to carry on its business (R. 115, 123, 128). In signing the document Respondent did not intend to attempt to change or qualify anything that had therefore existed — the boys' one-half ownership of the cattle or the partnership (R. 115) and he did not realize that the document might affect the partnership in any way until Revenue

Agent Jordan so told him in 1943 (R. 115, 123, 128). For these reasons Respondent did not think that the boys would be concerned with the document and he did not inquire if they would agree to it (R. 127) nor did he advised them of the existence of the document until after a conference with Jordan in 1943 (R. 96, 101, 117, 126). Respondent did not understand the document.[4] None of the boys signed the document (R. 96, 126) and their first notice of its existence was accompanied by Respondent's repudiation of the document, in 1943 (R. 96, 116, 126). After Revenue Agent Jordan had questioned the partnership, Respondent again conferred with Wright and at the latter's suggestion employed a Fort Worth accountant to handle the present tax matter (R. 116) and upon the accountant's recommendation that the Culbertson boys bring a proceeding in the State Court to ascertain the validity of the partnership and the effect of the December 8th document, Respondent then advised the Culbertson boys — all of whom were in the Army — of the existence of the document (R. 96, 116) and wrote W. O. recommending that the boys authorize such a suit (R. 96, 116). The sons authorized Respondent to have the suit brought (R. 97, 116) and Respondent employed Stallcup, who filed a suit for the four Culbertson boys and their sister against Respondents in the District Court of Dallam County, Texas and,

[4]Respondent did not read it; when it was read to him, Respondent merely asked Stallcup if it would be acceptable to Wright and Stallcup replied that it would (R. 115). Respondent's practice in dealing with his attornies is to do what they tell him to do (R. 115).

after a hearing, that Court returned a judgment that the Document of December 8th was void and the partnership of November 1939 was valid in all things. (Ex. 9., R. 145).

After the acquisition of Coon's interest in November 1939, questions arose as to the disposition of the Coon & Culbertson grass leases, horses, miscellaneous cattle, certain bulls, supplies and ranching equipment (R. 78, 92, 103); W. O. Culbertson & Sons concluded to purchase such items (R. 78, 92, 103). In line with this, the November 6th note of the Culbertson boys to Respondent was destroyed and a new note dated January 1, 1940, in the sum of $57,674.80 was executed by each of the boys and delivered to Respondent (R. 92; Ex. 6, R. 142). Later in January, 1940, Coon & Culbertson had an opportunity to sell the bulls and did so (R. 93) and the note was credited with $5,930.-00 reducing it to $51,744.80 (R. 92, 93, 95, 99). On December 30, 1940 Respondent gave to each of the four boys a $1,000.00 credit on the note, reducing it to $47,744.80 (R. 96). In mid 1941 the partnership of W. O. Culbertson & Sons borrowed $60,000.00 from the National Finance Corporation and turned it over to Respondent and Respondent credited the note with $30,000.00, reducing it to $17,744.80 (R. 96). The partnership, from its operations, later repaid this $60,-000.00 note (R. 104, 129) and no part of the $30,000.00 credit was a gift (R. 100, 104, 129). On June 10, 1941 Respondent made further gifts to the boys of the balance due, $17,744.80, and canceled the note (R. 96, 100;

Ex. 6, R. 142). Although a retained copy of his gift tax return was shown him, Respondent did not know whether he had filed returns covering the 1941 gifts (R. 111); the Commissioner made no contention that he had not done so (R. 112).

During 1940 and 1941 all of the partnership income came from the cattle (R. 95).

In 1940 W. O. was twenty-four years of age and married, Richard twenty-two and married, Joe Jack eighteen and Eugene sixteen (R. 93); all were man-sized and capable of doing a full ranching day's work (R. 73, 93). Upon the organization of the new partnership W. O., who had been foreman for Coon & Culbertson at a salary of $100.00 per month, became General Manager of the ranch and, by agreement of the boys, continued to draw as living expenses approximately the same amount (R. 95, 98). As manager during the tax years he had charge of and handled all ranching activities over the entire ranch, including the formulation and execution of the breeding program, the hiring and firing and supervising of all employees, the payment of all ranch expenditures, and the feeding and care of the cattle (R. 78,79,91,94, 95,110,118,130). In addition W. O., Richard, Joe Jack and Eugene did all tattooing, the certification of offspring, and in the fall prepared all registry papers with respect to offspring dropped during the tax years (R. 78, 94). During 1940 and 1941 Richard and Joe Jack continued their schooling in keeping with the part-

nership agreement and worked on the ranch when they were not in school up to the time they went into the Army (R. 78, 79, 80, 93, 100). During 1940 Richard was enrolled in Texas A. & M. but worked on the ranch during the summer and fall up until school time (R. 93, 100, 130); he graduated in May 1941 and went directly into the Army (R. 94). In 1940 Joe Jack worked on the ranch during the three summer months and on week-ends; he started to Texas A. & M. in the fall of 1940 but worked on the ranch during the summer months of 1941 (R. 94). During 1940 and 1941 Eugene worked on the ranch during the three summer months and on week-ends (R. 94). While at the ranch the three younger boys performed whatever work was available under the supervision of W. O. (R. 94, 130). Other than occasionally discussing ranching activities with W. O. (R. 95) Respondent performed no ranch work and, in fact, visited the ranch on an average of only once each month (R. 95, 103). At no time did Respondent attempt to tell W. O. how the ranch should be operated (R. 111). During 1940 and 1941 Respondent took care of the Dalhart office, handled contracts for the sale of cattle and arranged loans (R. 113, 119). In answer to the Court's interrogation, Respondent testified that, "The policies of the partnership as to when to buy cattle and when to sell" were determined by discussion of all of the partners; that he relied upon the boys' judgment in respect to policy matters and not his own and that if they did not want to do a certain thing it was not done (R. 129). During 1940 and 1941 the Culbert-

son boys drew from the partnership whatever funds they needed (R. 95).

Tax motives were entirely absent in the transactions involving the acquisition of Coon's interest and the formation of the new partnership; taxes were not mentioned nor did they have a bearing upon what was done (R. 80, 97, 112); it did not occur to Respondent that tax considerations were involved (R. 112). Respondent is a man of limited education; his schooling ended with the eighth grade, at which time he went to work on cow ranches (R. 112). Other than in signing returns prepared by others, Respondent had had no tax experience (R. 112). In late 1940, after talking it over with the Culbertson boys (R. 101), Respondent sold his daughter, Fannie, an one-eighth interest out of his one-half interest in the partnership for which he took her note (R. 101, 123; Ex. A., R. 150); it was later canceled as a gift (R. 122). While Respondent personally thought that his daughter was a partner, upon the advice of counsel, no claim was made in the Tax Court or the Court of Appeals that she was a partner for tax purposes (R. 12, 115, 122, 123).

A. A. Wright testified that he had been manager of the credit company since 1930 and during that time it had loaned some three-hundred million dollars to its cattle raisers (R. 81); that as the source of finances, he maintained a confidential relationship with borrowers and such borrowers frequently talked their problems with him (R. 81). As cattle raisers have

"to get a liking for the lifestock business as a child", and as the cattle business is a lifetime proposition, his policy in discussing loans and problems with cattle raisers having sons is to recommend the borrower taking his sons into the partnership with him (R. 82, 84) and, as such sons rarely have capital, he suggests time purchases or gifts in order to qualify the sons as partners (R. 82, 84). This strengthens the loan because it enables the business to continue if the father becomes incapacitated, it supplies the indispensible inducement and incentive to stay on the ranch and it opposes the trend of young men leaving ranches and going to urban employment. Approximately ten per cent of his company's loans over the years have been made to father and son cattle partnerships (R. 82, 84).

SUMMARY OF ARGUMENT

I.

The *Tower* and *Lusthaus* cases are not applicable here, and the sons' share of the income of W. O. Culbertson & Sons should not be taxed to Respondent, because:

A. The sons unconditionally acquired Coon's one-half interest in the brood herd in an arms-length, bona fide transaction and their contribution of such interest to the partnership did not divest them of their rights, tax-wise or otherwise;

B. The transactions terminating in the organization of W. O. Culbertson & Sons did not result in splitting or re-allocating Respondent's pre-existing income, but, from the viewpoint of the Culbertson family, constituted the acquisition of additional property and income; and

C. Coon's sale to Respondent, Respondent's sale to the Culbertson boys, and the organization of W. O. Culbertson & Sons, were phases of the same transaction; there is no legal justification for the Tax Court's action in recognizing the first phase and ignoring the latter two.

II.

If the *Tower* and *Lusthaus* cases are applicable, then the judgment of the Court of Appeals was correct, because the Tax Court erroneously disregarded most of the legal principles established in those cases for the determination of the tax-validity of a family partnership, giving consideration only to the principle having to do with the contribution of capital and the rendition of services — which it improperly applied.

ARGUMENT

I.

A father is not taxable upon the income of an undivided one-half interest in cattle unconditionally acquired by his sons, in an arms-length, bona fide transaction with a third party, and contributed to the

father and son's partnership — the third party having conditioned his agreement to sell upon such acquisition and contribution. That plain matter of law, arising from and supported by both the undisputed evidence and the findings of fact of the Tax Court, was perceived by the Court of Appeals and impelled its holding. A brief review of the facts and findings will present the issue.

At the outset, the mind can be freed of the question whether the Coon-Respondent-Culbertson boys' transactions of October-November, 1939 were in substance what they appeared to be in form; the possibility of tax consequences did not occur to the parties (R. 80, 97, 112) and no contrary assertion has been or is made.

In October, 1939, Uncle Dick Coon and Respondent each owned an undivided one-half interest in the Hereford cattle breeding partnership of Coon & Culbertson and its cattle (R. 73); neither had any claim to the other's one-half interest. Coon, retiring, was intent upon assuring the continuation of his life's work — the breeding of Domino Herefords — which Coon & Culbertson had carried to an advanced stage (R. 72; Ex. 3, R. 135). He thought Respondent was too old to carry on this long-range program (R. 75); he was well acquainted with the grown and nearly-grown Culbertson boys and familiar with their resources and qualifications (R. 72). Consequently when Respondent made him an offer to purchase his interest in the

brood herd — the apex of Coon-Culbertson achievement — he was ready with his plan (R. 72). Witnesses Williams (R. 71-3) and W. H. Coon — unrelated to the Culbertsons (R. 74) — detailed the resulting contract (R. 75):

> "I don't remember his exact words in that connection but Mr. Culbertson had made him an offer on these cattle that would clean him up and I recall that Mr. Coon didn't think that Mr. Culbertson could carry that herd on by himself, due to his age. Mr. Coon told Mr. Culbertson, 'You can go on with it with the assistance of your boys' and he said, 'I will accept your proposition. I will sell you my interest in these cattle if they can take my place, if you will sell it to them, just like I sell it to you, and continue on with this herd of cattle, providing they want to do it.' Mr. Coon added, 'W. H. (meaning me) here will close the deal with you.' Mr. Culbertson said, 'I will discuss it with the boys. I am sure they will.' In accepting Mr. Culbertson's proposition, he stated that he was willing to accept it if the Culbertson boy would step into his place; that is what he meant by saying the he would sell to Mr. Culbertson if Culbertson, in turn, sell to the boys so that they would take his place."

The Tax Court found that "at about that time" Respondent offered to buy Coon's interest and that Coon accepted the offer "provided Petitioner (Respondent) would sell his four sons an undivided one-

half interest in the herd at the same price" (R. 33); that Respondent discussed this offer with the Culbertson boys and they agreed, and that Respondent "offered to finance the purchase of the undivided one-half interest for the boys" (R. 33, 34); Coon made the same offer a few days later (R. 91). The Tax Court further found that on November 4, 1939, Coon & Culbertson gave Respondent a bill of sale to the brood herd for which Respondent gave the partnership a $99,440.00 check; two days later Respondent and wife executed to the four Culbertson boys and delivered to W. O. a bill of sale to an undivided one-half interest in the same cattle, and the Culbertson boys gave Respondent their note for $49,720.00 bearing interest at four percent and due in one year "for the one-half undivided interest in the cattle described in the bill of sale" (R. 34). Coon later checked to see if the Culbertson boys had acquired his interest (R. 76).

Respondent, individually, tried to purchase Coon's interest; he failed. Coon conditioned his agreement to sell to Respondent upon two things: that Respondent would sell to the Culbertson boys "just like" Coon sold to Respondent, and that the Culbertson boys would take Coon's place in the partnership, for the purpose of "carrying that herd on" (R. 75, 91). These were not sophisticates dealing in innuendo or terms of pretense; they were ranchers, having confidence in each other, speaking in plain terms and each fully understanding the other.

Petitioner contends (Petition Brief, p. 12) that the Court of Appeals adopted "a formalistic test" based on "bare legal title". Respondent was the only person who held a bare legal title and then only for two days — November 4 to November 6, 1939. To claim that he had more is to rely upon a formalistic test. In honesty, in morals and in law, Respondent was never the true owner of Coon's interest; the record is quite bare of anything to show that he did acquire or could have acquired the beneficial title to Coon's interest. No Court would heed a contention by Respondent, were he to make one, that he acquired fee simple title to that interest. Respondent's acquisition of "bare legal title" cannot be separated from his obligation to convey it to the boys just like Coon conveyed it to him, for the former was conditioned upon the latter. At best, for two days Respondent was a trustee of the title; that the title was conveyed to him and not directly from Coon to the four boys was coincidental and arose only at W. H. Coon's suggestion (R. 76, 107). All parties understood Coon was selling to the four Culbertson boys (R. 75, 88, 98, 102, 106). No argument is needed to show that either Coon or the four Culbertson boys could have legally forced Respondent to convey the Coon interest to the boys.

As of November 6, 1939, Respondent had fulfilled his contract with Coon; he had conveyed the Coon interest to the boys without strings or conditions (R. 92, 109, 184). Pursuant to his offer, the boys had delivered to him their joint note in good faith and full

knowledge that it had to be paid, unconditionally (R. 89, 90, 92, 100, 109). Respondent retained no lien and the substance of the transaction would not have been altered if he had. There were no agreements or understandings as to the application of profits to the payment of the boys' note or that the note would be forgiven or that the transaction was colorable or a sham. That Respondent initially paid Coon the purchase price (R. 34) and later voluntarily forgave two-fifths of the note (R. 34) and that Respondent, in order to secure a line of credit for the partnership, signed an ex parte document which purported to reconvey an undivided one-half interest to the sons but subject to new terms and conditions (R. 115, 123, 128), can not retroactively change the bona fides of the November, 1939 transactions or alter their economic and legal effect. This is the purport of the decision of the Court of Appeals (R. 183-7) and that decision is correct. *Hoeper* v. *Tax Commission*, 284 U.S. 206, 52 S.Ct. 120, 76 L.Ed. 248; *Blair* v. *Commissioner*, 300 U.S. 5, 57 S. Ct. 330, 81 L. Ed. 465; *Durwood* v. *Commissioner*, (CA8) 159 F. 2(d) 400.

A corollary of the foregoing is that, unlike the *Tower*[5] and *Lusthaus*[6] cases, this case, from the standpoint of the Culbertson family, involves the acquisition of additional property and income and not

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[5] *Commissioner* v. *Tower*, 327 U.S. 280, S.Ct. 532, 90 L.Ed. 670.
[6] *Lusthaus* v. *Commissioner*, 327 U.S. 293, 66 S.Ct. 539, 90 L. Ed. 679. With respect to the substance of the dissimilarities, see *Walsh* v. *Commissioner*, (CA8) 170 F.2(d) 535 at 539.

the splitting of pre-existing income among family members in order to reduce taxes. *Durwood* v. *Commissioner*, supra. The *Tower* and *Lusthaus* cases dealt with a broad, but bounded, type of situation; they dealt with husband and wife, members of a marital union and not father and grown or nearly-grown sons — and there are substantial social, economic and legal differences; they considered artificial, tax-inspired partnerships and not genuine unions motivated by present and potential practical benefits to accrue to each partner by the joinder of the others; they followed "a general pattern found in many of the 'family partnership' cases" 327 U.S. at 285: they involved a purported division of what had been, admittedly, the taxpayer's right to income and they found that the economic substance of the transaction was insufficient to support the claimed division of tax liability. In the present case, the Culbertson boys neither claim, nor have they received, any property or income which belonged to Respondent prior to the creation of W. O. Culbertson & Sons; they do claim the Coon interest and have paid taxes upon the income derived therefrom. Respondent makes no contention that he is not taxable upon the income from the one-half interest he owned both before and after the organization of W. O. Culbertson & Sons. There is nothing in the *Tower* and *Lusthaus* cases which, upon penalty of having to pay taxes upon income not received, prohibits a father from assisting his sons in acquiring property from an outsider in a bona fide, arms-length transaction.

If W. O. Culbertson & Sons was a partnership valid for tax purposes, the partnership income is taxable to the members in keeping with Sections 181, 182 Internal Revenue Code (28 U.S.C. Sec. 181, 182). To sustain its position that the sons' one-half of the partnership income is taxable to Respondent, the Government must establish the invalidity, for tax purposes, of of that partnership and that, ignoring the invalid partnership, such income would have been Respondents and taxable to him. But, indisputably, the transfer from Coon to Respondent, the transfer from Respondent to the Culbertson boys, and their entrance into the partnership were but phases of one transaction. If W. O. Culbertson & Sons is ignored and the conveyance to the Culbertson boys is held ineffective, what remains to indicate that Respondent would have acquired the Coon interest or would have been taxable on the income therefrom? Respondent tried, unsuccessfully, to purchase Coon's interest for his own account. Speculation cannot take the place of probative evidence; an inference must necesarily yield to evidence of the actual occurrence. *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333, 340; 53 S.Ct. 391, 394, 77 L. Ed. 819; *Foran* v. *Commissioner*, (CA5) 165 F.2(d) 705; *Lueders Estate* v. *Commissioner*, (CA3) 164 F.2(d) 128.

II.

We submit that, in this case, the Tax Court erroneously disregarded and improperly applied certain principles announced in the *Tower* and *Lusthaus* cases, if such cases are applicable; and that the decision of the Court of Appeals was an appropriate correction.

In *Commissioner v. Tower*, Tower owned approximately 9/10ths of the stock of a corporation manufacturing machinery and was confronted with the prospect of large profits and taxes; following the recommendation of tax advisers, he transferred to his wife some 4/10ths of the stock "on condition that she place the corporate assets represented by these shares into the new partnership", 327 U.S. at 285; the corporation was dissolved and three days later a limited partnership was organized, Tower and one other being general partners and the wife a limited partner. The wife furnished no services and the organization of the new partnership in no wise altered the conduct of the business or Tower's dominance thereof. The Commissioner taxed the wife's share of the partnership income to Tower, and before the Tax Court defended this action on the ground that the gift of stock was incomplete, the wife had contributed nothing and "her alleged membership in the partnership was a sham" 327 U.S. at 283. The Tax Court concluded that the gift was incomplete, that Tower continued to dominate the business, that the transactions merely reallocated Tower's income within the family group, that the purported partnership fulfilled no business purpose, that the income was earned by the husband and that no real partnership existed. The Court of Appeals reversed and upon certiorari, this Court affirmed the Tax Court, pursuant to *Dobson v. Commissioner*,[7] be-

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[7]320 U.S. 489, 66 S.Ct. 239, 88 L.Ed. 248. In this connection see, 26 U.S.C. Sec. 1141(a) as amended by Act of June 25, 1948, Sec. 36 of Pub. Law 773, 80th Congress, 2nd Sess.; 28 U.S.C. Sec. 875; Fed. Rules of Civil Procedure, Rule 52; *Helvering* v. *American Dental Co.*, 318 U.S. 322 at 330, 63 S.Ct.

cause the facts were sufficient to support the Tax Court's findings. In so doing, this Court considered the factual background, the prior history of the business, the reasons for and factual circumstances surrounding the creation of the partnership,[8] the subsequent history and manner of operation of the partnership, and announced (327 U.S. at 287) the decisive inquiry:

> "When the existence of an alleged partnership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their 'agreement' considered as a whole, and by their conduct in execution of its provisions'.

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577 at 582, ... L.Ed. ....; *Bogardus* v. *Commissioner*, 302 U.S. 34, 58 S.Ct. 61, 82 L.Ed. 32; *Helvering* v. *Rankin*, 295 U.S. 123, 55 S.Ct. 732, 79 L.Ed. 1343; *Kohnstamm* v. *Pedrick*, (CA2) 153 F.2(d) 506 at 508; *Commissioner* v. *Bonwit*, (CA2) 87 F.2(d) 764.

[8]Here the Tax Court merely found that "about that time (Respondent) offered to purchase the remainder of the herd at a price around $65 per head. Petitioner's offer was accepted by Mr. Coon, provided Petitioner would sell his four sons an undivided one-half interest in the herd at the same price" (R. 33) and "Petitioner offered to finance the purchase of the undivided one-half interest for the boys" (R. 34) and ignored the undisputed evidence of Coon's motive in attaching the condition to his agreement to sell (supra p. 5), the contractual agreement under which the Culbertson boys were brought into the partnership (supra p. 5,6) and the long-range purpose they were to serve (supra p. 5-7).

Drennen v. London Assurance Company, 113 U.S. 51, 56, 5 S.Ct. 341, 344, 28 L.Ed. 919; *Cox v. Hickman*, 8 H.L.Cas. 268. We see no reason why this general rule should not apply in tax cases where the government challenges the existence of a partnership for tax purposes. Here the Tax Court, acting pursuant to its authority in connection with the enforcement of federal laws, has found from testimony before it that respondent and his wife did not intend to carry on business as a partnership. This finding of fact, since supported by evidence, is final. *Commissioner v. Heininger*, 320 U.S. 467, 475, 64 S.Ct. 249, 254, 88 L.Ed. 171; *Dobson v. Commissioner*, 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248. The decision of the Tax Court was therefore correct unless, as respondent contends, the Tax Court erroneously disregarded or improperly applied certain legal principles."[9]

and (327 U.S. at 284):

"The issue is who earned the income and that issue depends on whether this husband and wife really intended to carry on business as a partnership. Those issues cannot be decided simply by looking at a single step in a complicated transaction. To decided who worked for, otherwise created or controlled the income, all steps in the

[9]The Tax Court here made no findings as to whether Respondent and the Culbertson boys "really and truly intended to join together for the purpose of carrying on business" althought the evidence was undisputed that they did so.

process of earning the profits must be taken into consideration."

The Court then held that the validity of the partnership under state law was not controlling; that while taxpayers have a legal right to reduce by permissable means the amount of what would otherwise be their taxes, a showing that the partnership arrangement was made for the purpose of reducing taxes simply lends further support to the inference "that the husband still controls the income from his partnership interest, that no partnership really exists and that the earnings are really his and are therefore taxable to him and not to his wife" 327 U.S. at 289;[10] that while legal ownership of the assets will throw light on the broader question of the reality of the alleged partnership, it was unnecessary to decide whether the Tax Court was correct in its holding that the gift was conditional and incomplete,[11] that while a husband and wife may become partners for tax purposes if she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital services, nevertheless if she does none of these things, "the Tax Court may properly take these cir-

[10]Although there is not a scintilla of evidence that motives of tax reductions were involved in the present transactions, or even thought of (supra p. 17), the Tax Court opinion does not mention this pertinent factor.

[11]See infra p. 38.

cumstances into consideration in determining whether the partnership is real" 327 U.S. at 290;[12] that the management and control of the business and the use of the income therefrom were not altered and that the purported partnership wrought no change in the economic relationship of the parties to the income but merely attempted a paper reallocation of income among the family members.[13]

Here the Tax Court limited its inquiry and discussion to facts pertaining to one — capital and services — and some parts of another of the categories of factual inquiry and legal determination this Court in the *Tower* case indicated were to be considered and determined, ignoring or passing over the remainder. The memorandum opinion of the Tax Court Judge states (R. 46),

> "The questions presented to us here are whether the business organization of W. O. Culbertson & Sons constitutes a partnership for federal income tax purposes * * *",

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[12]Here, the Tax Court considered the inquiry into the contribution of capital and the rendition of services as being the sole criterion of the tax validity of a partnership and not merely as circumstances to be taken into consideration. See *infra* p. 42-34.

[13]For the obvious reason that Respondent had not owned or been entitled to the income from the Coon one-half interest before W. O. Culbertson & Sons was organized, the Tax Court made no findings or conclusions as to changes in economic relationship or reallocation of income. See *infra* p. 45.

then incompletely states the positions of the parties, quotes the excerpt from the *Tower* case that under certain circumstances husband and wife may become partners for tax purposes, and continues (R. 47):

> "Our first consideration is to examine the business transactions to determine whether, within the language of the Tower case, the Culbertson boys actually invested any capital in the alleged partnership."

and (R. 49):

> "We consider next whether the sons contributed such services as, under the Tower case and others to the same effect, would justify recognition of a partnership."

The Court then held, as a legal matter, the ex parte December 9, 1939 document was the partnership agreement rather than the oral agreement of November, 1939 and concluded (R. 56):

> "As to the partnership question, we therefore hold for the Respondent."

This method of procedure appears to have been the rule in the Tax Court rather than the exception.[8] The

[8] "It is by now well settled that, in order to sustain a family partnership for tax purposes, it must be shown that the wife contributed either capital, or services of vital nature." *Ed-*

Tax Court gave no consideration to the substance of the transactions before it — that the partnership arose as a result of a binding contract with a third party.

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win F. Sandberg, 8 T.C. 423 at 428. See *Isaac Scherr* (10-3-47), P.H.T.C. Memo. Dec. 47,281.

1 Rabkin & Johnson, "Federal Income, Gift & Estate Taxes", P. 907b and 907c:

"*Business purpose.* In the *Tower* case, considerable emphasis was placed upon the tax avoidance motive, and upon the absence of any 'business' reality. Several lower court decisions have since indicated that a primary purpose to divide taxable income is weighed heavily against the taxpayer. See *Appel* v. *Smith*, 161 F.2(d) 121; *Scherf* v. *Commissioner*, 161 F.2(d) 495, cert. den. 332 U.S. 810; *Benson* v. *Commissioner*, 161 F.2(d) 821; *Belcher* v. *Commissioner*, 162 F.2(d) 974, cert. den. 332 U.S. 824; *Dawson* v. *Commissioner*, 163 F.2(d) 664; *Nordling* v. *Commissioner*, 166 F.2(d) 703."

"The Tax Court, however, has apparently held that tax avoidance is not an essential *Tower* factor. Conceding that the wife's interest was created solely because of business necessity, the court refused to recognize her interest where she contributed neither services nor 'original' capital. *Margaret F. Horowitz*, TC Memo., C.C.H. 15,843, P-H 47,153; cf. *Lily Ho Quon*, TC Memo. Dock. 5805, C.C.H. Dec. 15,711, aff'd 165 F.2(d) 215, cert. den. ..... U.S. .....; *Robert S. LeSage*, TC Memo., C.C.H. 16,163, P-H 47,318. On the other hand, where services justify the partnership, it is not fatal that tax avoidance was a substantial motive. *Harris T. Kille*, TC Memo., C.C.H. 15,952, P-H 47,217."

Family partnership cases are exhaustively reviewed, 6 Mertens, "Law of Income Taxation," 1948 Cumulative Pocket Supplement, p. 30 et seq.

The legal error in such procedure is noted in *Kent* v. *Commissioner* (CA6) 170 F.2(d) 131 at 136 and discussed by Robinson, "The Allocation Theory in Family Partnership Cases," 25 Taxes 963.

which called for services and skill indefinitely from the Culbertson boys, and that it involved the acquisition of additional property and income rather than the splitting of pre-existing income — nor did it inquire into whether the parties really and truly intended to join together to carry on business, who really earned the income in question, the bona fides of the parties and the presence or absence of tax reduction motives, whether the partnership wrought a real change in the economic relationship of the parties to the income, whether the income in question was available to and under the control of Respondent, and whether the transactions were " mere paper reallocation of income among the family members."

When the Tax Court, or any trial court, either misconceives the scope and applicability of principles established by this Court, or ignores such principles or misinterprets them, or does all of these things, it becomes the duty of the Courts of Appeal to correct such error.[15] That is what the Court of Appeals

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[15]Section 1141(c)(1) Internal Revenue Code (28 U.S.C. Sec. 1141(c)(1) dealing with review of decisions of the Tax Court by the Courts of Appeal, provides:

"(c) Powers—(1) To affirm, modify or reverse.—Upon such review, such Court shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a re-hearing, as justice may require."

See *Wbosley* v. *Commissioner*, (CA6, 1948) 168 F.2(d) 330. *Kent* v. *Commissioner*, supra note 14; *Hartz* v. *Commissioner*

did here and, when the found and undisputed facts of this case are measured by the principles of the *Tower* and *Lusthaus* cases, it is respectfully submitted such was the only proper action the Court of Appeals could have taken.

It is not our intention to re-argue the facts of the case nor any specific finding or conclusion of the Tax Court — nor, indeed, would this Court be interested in any such procedure — but, as the case is posed, we believe it our duty to point to Tax Court findings which sustain the action of the Court of Appeals, and to undisputed evidence pertaining to some issue ignored by the Tax Court but emphasized by this Court in the *Tower* case, and to improper applications by the Tax Court of *Tower* principles, and to the corrective action taken by the Court of Appeals.

First. The ultimate test. In keeping with the rule established in the *Tower* case, the Court of Appeals stated (R. 187):

"The inquiry as to a family partnership for income tax purposes must relate to evidence bearing

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(CA8) 170 F.2(d) 313 at 318; in *Helvering* v. *American Dental Co.*, supra, note 7, this Court stated (318 U.S. 330): "We do not feel bound by the finding of the Board because it reached its conclusions, in our opinion, upon an application of erroneous legal standards. Section 22(b)(3) exempts gifts. This does not leave the Tax Court of the United States free to determine at will or upon evidence and without judicial review the tests to be applied to facts to determine whether the result is or is not a gift."

> on the reality, the actuality and the bona fides of the transaction or the absence thereof. Where the proof conclusively shows that a family partnership was entered into for the benefit of the business and not for the purpose of evading, avoiding or dividing, income taxes, it will be deemed a partnership for income tax purposes even as it was recognized in the law for all other purposes."

The Tax Court in the present case made no findings with respect to such test, nor was it taken into account.

Second. Tax reduction motives. In the *Tower* case this Court held that the presence of an express purpose to reduce taxes lends support to findings that the husband still controls the income, that no partnership really exists, and that the earnings of the partnership are really his. 327 U.S. at 289. It follows that the absence of such purpose, express or implied, lends support to the reality of the partnership under investigation. The nature of the transactions leading to W. O. Culbertson & Sons intrinsically demonstrates that tax reduction motives were not involved; the testimony, without a word or implication to the contrary, is that taxes were not mentioned during the transaction resulting in the creation of the partnership and had no bearing whatsover upon what was done (R. 80, 97, 112), nor, in fact, did the possibility of tax effects occur to the parties (R. 97, 112). The Tax Court did not mention these factors.

Third. The partnership agreement. The uncontradicted evidence discloses that Coon disposed of his interest on condition that the Culbertson boys take his place in the partnership (R. 75, 78), that a partnership was organized by oral agreement around November 1, 1939 (R. 80, 90, 98, 103, 107) and that this partnership was widely publicized during October and November, 1939.[16] While there are no specific findings on the point, the Tax Court apparently held (R. 50-53) that the ex parte document of December 9, 1939 was the partnership agreement. The Court of Appeals, noting the undisputed objective in having this document prepared, its ex parte nature (R. 184, 185), and the fact that the Culbertson boys were unaware of its existence until long afterwards (R. 184) held, as a matter of law, that the document could not be an agreement and was without legal force or effect, that undue weight and emphasis given this document by the Tax Court lead it to erroneous holdings, and that the real partnership agreement was the oral one predicated on the November 6, 1939 bill of sale to the boys (R. 182,183,185). *Hartz* v. *Commissioner*, supra, and cases cited notes 7 and 15.

[16] Letter of October 23, 1939 to the finance company (R. 77, Ex. 4, R. 136); newspaper story of December 2, 1939 (R. 77, Ex. 3, R. 135); Hereford Association certificate of November 13, 1939 (R. 77, Ex. 7, R. 143); Wright's testimony of his notification of the partnership (R. 81-83); bank accounts were opened upon which all could check (R. 95) and partnership books set up (R. 93) and stationery printed containing the names of all partners (R. 110).

Fourth. Contributions of capital. In the *Tower* case this Court noted that one of the matters throwing light upon the reality of questioned partnerships was the legal ownership of the capital contributed by the questioned partner and that one of the elements was the investment of capital originating with the questioned partner. 327 U.S. 290. The Tax Court here *found* that Coon stipulated the Culbertson boys were to acquire a one-half interest in the brood herd (R. 33), that Respondent "offered to finance the purchase of the undivided one-half interest for the boys" (R. 34), and that, upon receiving the bill of sale to all of the cattle from Coon & Culbertson, Respondent executed a bill of sale to the four Culbertson boys covering an undivided one-half interest in the same cattle involved in the previous bill of sale (R. 34); that this November 6, 1939 bill of sale was given to W. O. and the next day the boys gave to Respondent a note for $49,720.00 due one year from date at four per cent interest "for the one-half undivided interest in the cattle described in the bill of sale" (R. 34); that Coon & Culbertson owned other property, cattle, grass leases, horses, etc., which were "not conveyed to Petitioner or his sons in the foregoing transaction" hence, when W. O. Culbertson & Sons agreed to purchase them, the boys' note was increased and, during the tax years, discharged by a credit, gifts from Respondent, and by profits of the cattle to the extent of two-thirds of the note (R. 34, 35, 48). The Tax Court held that the boys did not buy their interest from Coon (R. 47) but from Respondent (R. 48). The

testimony is undisputed that the Culbertson boys considered themselves unconditionally obligated to pay the note (R. 76, 89, 90, 92, 109). Respondent had testified (R. 118),

> "At the time the boys gave me this note it was due and payable one year after date. With respect to whether I felt the boys would be able to pay it off in a year, I didn't give it much thought at all; I just told them we would make the note for a year. I made them that proposition — finance it in one year. I didn't intend for these to be gifts to the children; I never gave it any thought at the time."

And from this the Tax Court concluded (R. 48),

> "There is no essential difference, under all the facts here, between a gift of a capital contribution by a father or husband in the beginning, and the gift of it later when the father forgives the notes, particularly in the light of the father's testimony, relative to whether he felt the boys would be able to pay in the one year specified in the note * * * We think he did not expect or intend them to pay it."

The Tax Court further held (R. 49) that an indeterminate part of the capital contributions — the difference in value between one-half of the brood herd (the cream of the crop (R. 73)) and the purchase price, (the average price previously received by the

old partnership for pure-blood, commercial, grade cattle and Brafords (R. 73)) — was not contributed by the Culbertson boys because (R. 49) Respondent testified that the purchase price was around $65 per head (R. 127) for the 1400 odd cattle, a one-half interest in which was purchased from Coon, whereas on December 31, 1940 (fourteen months after the purchase from Coon) the partnership inventoried (on a basis of cost or market which ever is lower (R. 168)) 2,191[17] head of cattle (R. 127) at an average price of $60 per head. The Court of Appeals noted that the November 6, 1939 bill of sale to the Culbertson boys was pursuant to Respondent's agreement with Coon, that it was absolute, with no strings attached (R. 182), and that "there is not the slightest proof in the evidence but that the four Culbertson boys each acquired a one-fourth interest in the one-half interest of Coon in the cattle in question" (R. 182-3).

In the case of a tax inspired, conditional transaction taking the form of a sale to a wife who was not intended to be a real partner, followed by a partial, agreed repayment from profits, this Court held in *Lusthaus* v. *Commissioner* that the wife was not a genuine partner, but that case is not in point here. There was no sham in these transactions nor anything artificial about what was done; the October-November, 1939 transactions were in substance what they appeared to be in form. The question of law here

[17] Which, of course, included calves dropped in the fourteen months (R. 102).

posed is whether an arms-length, bona fide sale on credit by a father to his experienced sons, pursuant to the father's contract with a third party, is an adequate basis for the ensuing partnership, in the present and future operations of which it was contemplated and agreed by all parties the sons were to take a vital and leading part. Our investigation has revealed no Supreme Court case directly in point. In the *Tower* case the effectiveness of the gift was not decided. *Lucas* v. *Earl*, 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731; *Helvering* v. *Horst*, 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75 and cases stemming therefrom are distinguishable because (1) this was not a gift of income but a transfer of property which later produced income and (2) the conveyance by Respondent was pursuant to a binding contract with Coon. See *Blair* v. *Commissioner*, 300 U.S. 5 at 11. This Court has never departed from the principle that the income of unconditionally-transferred property — as distinguished from a transfer of the right to the income — is taxable to the transferee. *Blair* v. *Commissioner*, supra; *Commissioner* v. *Tower*, supra; *Pearce* v. *Commissioner*, 315 U.S. 543, 62 S.Ct. 754, 86 L.Ed. 1016. That principle, it is submitted, has applicability here. The Tax Court neither found nor concluded that the sons' note to Respondent, when given, was not a valid, enforceable, unconditionally-payable obligation; nor did it find or conclude that Respondent's bill of sale to the sons, on the date it was given, was conditional or that it conveyed less than the fee simple title; nor did it find or conclude that these transactions were,

on that date, colorable or other than what they seemed; and the undisputed evidence is compelling that all were unconditional, effective and bona fide. How then were these transactions made colorable and ineffective? The Tax Court says that Respondent's ex parte, subsequent activities had that effect: In December, 1940 and June, 1941 he voluntarily forgave a part of the note; and, unknown to the Culbertson boys and merely for the purpose of securing a line of credit for the partnership, he signed a document purportedly reconveying an undivided one-half interest to the sons but upon restrictive conditions. It is submitted that upon such clear cut evidence, the Tax Court's legal conclusion is indefensible, as the Court of Appeals found it to be (R. 184, 185).

Fifth. Rendition of services. The *Tower* case indicates that one element in the determination of the reality of family partnerships is an inquiry into whether the wife contributes to the management of the business or otherwise renders vital services. The evidence as to the business and educational qualifications and services of the four Culbertson boys and the purpose they were to serve as partners has been set out. Supra p. 5,6. In its findings the Tax Court summarized the boys' experience (R. 32, 44); it found that after W. O. Culbertson & Sons was formed, W. O. continued to work as foreman under the same arrangement as for Coon & Culbertson (R. 35); that Richard, Joe Jack and Eugene rendered some ser-

vices during the tax years but that Richard upon graduation from college in May, 1940 went directly into the Army and Joe Jack had to quit college due to the war (R. 44); that Respondent looked after the office and "was at the ranch frenquently during the taxable years, an average of a little more than once each month" (R. 44); that (R. 45),

> "The essentials of fine Hereford breeding involves three phases. One is feed and care and a understanding of type of feed for certain ages and classes of animals. Constant care is required and it is essential to have proper blood lines; also to maintain those lines and to understand outcrops and the types of breeding desired."

It concluded that the three younger sons contributed no vital services (R. 49); that W. O. is in a different position but that he contributed no services to the partnership (R. 50);

> "We think in general that services do not greatly effect this case" (R. 50) * * * "The bare legal title to the assets is not the essential element in the production of the income. The evidence before us of the necessity for business management and care in the raising of fine Hereford cattle will not permit a conclusion that income is derived from ownership of the cattle, 'constant care' was required, 'proper brood blood lines' are necessary and understanding of 'outcrops in the types of breeding are essential' " (R. 56).

There were no findings concerning the participation by the four sons in management problems although, upon inquiry by the Court, Respondent testified without dispute that all of the members of W. O. Culbertson & Sons participated in and determined the policies of the partnership (R. 129).

The Court of Appeals concluded that these conflicting and diverse Tax Court holdings, shocking to those who look at the actualities,[18] could not be accepted (R. 182-4); further that it was not illegal tax-wise for a partnership to be formed in consideration and contemplation of services to be rendered in the future by the partners (R. 185); that a partnership is formed to act in the future and when it is fully expected, intended and agreed that the incoming partners will render services, the Government should not be allowed to take advantage of a failure to render such services caused by enlistment in the Army (R. 187).

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[18]W. O., ranch-reared, thoroughly experienced, and educated in Animal Husbandry, was in complete charge of the hundreds of cattle on the 52,000 acre ranch and of all the men and activities thereof (R. 78, 79, 94, 110, 118). Respondent testified, " I never endeavored to tell W. O. Jr. how this ranch should be run" (R. 111). It is most difficult to understand who, if not W. O., was responsible for the "essential", "constant care of the cattle"; assuredly Respondent, aging, injured and unable to do physical work (R. 111) who went to the ranch on an average of once a month (R. 44) could neither discharge or supervise such responsibilities. It is likewise difficult to accept the Tax Court conclusions that $1,200.00 per year was adequate compensation for a college educated, married man — W. O. — carrying such responsibilities (R. 35, 50).

These appropriate conclusions, based upon the underlying premise of the Coon-Respondent contract of sale and the history of the tax years — that the Culbertson boys were to take Coon's place in the partnership and carry on idefinitely the breeding program; and that Richard and Joe Jack failed to perform ranch work during a part of the tax years due to Army service — have been smilarly voiced by other Tax Court Judges[19] and, quite recently, by the full Tax Court.[20]

Sixth. Economic Changes. In the *Tower* case this Court indicated that no real change in the economic relationship of the husband and wife to the income in question was brought about by the purported partnership, that no capital not available for use in the business before was brought into the business by the formation of the partnership, and that the partnership was a mere paper reallocation of income among the family members. 327 U.S. at 291. In the present case the Tax Court gave consideration to none of these factors.

In this case we are not dealing with one family but three existing families and two budding families: during the tax years W. O. and Richard were married

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[19] *Harry P. Samuels*, 1945 (P-H) T.C. Memo. Dec. 45,284; *Mack Perlman*, 1947 (P-H) T.C. Memo. Dec. 47,286; *Camillo Cicinelli*, 1947 (P-H) T.C. Memo. Dec. 47,264.

[20] *Isaac Blumberg*, 11 T.C. ....., 10-25-48, reviewed by the whole court.

and living apart from Respondent's family, and Joe Jack and Eugene were approaching marriageable age (R. 93). We are not dealing with income which, prior to the creation of W. O. Culbertson & Sons, had belonged to any of the members of that partnership; it came to the sons, or this family, solely as a part of the circumstances from which this partnership sprang; hence it could not have been used previously by any one here involved and there is no evidence that it was used by or for Respondent's benefit in the tax years. Respondent did not dominate this partnership (R. 90, 98, 111, 129). Unless what we believe to be the impossible feat of dividing the initial agreement of sale into one valid phase (Respondent's acquisition of the Coon interest) and two invalid phases (the transfer to the sons and the organization of the partnership), is accomplished, capital was brought into the business of this partnership by its creation. Obviously no paper reallocation of income was involved because, insofar as all members of this partnership, including Respondent, were concerned, the income in question had not previously existed.

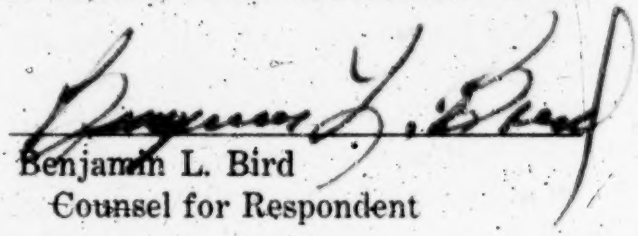
CONCLUSION

R. S. Coon, forced to retire, determined to do what he could to preserve and perpetuate the results of his lifetime avocation — the breeding of fine Herefords. To accomplish this end, he might have selected Respondent but he thought the latter too old, or he might have selected his nephew, W. H. Coon, who was at hand — but he did neither. He had observed

the Culbertson boys for many years and his choice fell upon them, and, whether it be called capital or services or something else, the Culbertson boys had sufficient to contribute to the resulting organization to cause Coon to condition the sale of his interest upon their acquisition of it. Coon initiated the transfer of title to the boys and the organization of W. O. Culbertson & Sons, and the function the sons were to perform was the lifetime job of "carrying this herd" into the future. The Culbertson boys acquired their interest indirectly from Coon and, somewhat coincidently, Respondent financed the acquisition upon their unconditional agreement to repay. There was no semblance of fiction, sham or artificial motivation in these transactions; Respondent and his sons really and truly intended to join together for the purpose of carrying on business and sharing in the profits and losses. The Culbertson boys made the partnership possible; they supplied and are supplying one of the two forms of consideration moving to Coon for his interest in the cattle; later through their services — primarily those of W. O. — three-fifths of the purchase price of their interest were repaid to Respondent out of profits; they performed services for the partnership, in part by direct work and in part by qualifying themselves to better serve it; they are carrying the herd on. There being nothing unreal or spurious about these transactions, the ex parte document of December 9, 1939, considering the purpose for which it was executed, and Respondent's forgiveness fourteen and twenty months later of

two-fifths of the purchase price could not destroy the pre-existing reality and the economic genuineness of the partnership. This forgiving of a part of the note was no doubt a gift, but in what better way could Respondent have provided himself with old-age security? Any attempt to attribute the earnings of the sons' one-half of the cattle to Respondent runs squarely into the solid facts that he never owned this interest in the cattle and that his efforts did not produce this income. Respondent had no more power or control over the sons' one-half interest or the income arising therefrom than the sons had over his one-half interest in the cattle and income; all questions of major policy were decided by all partners. From the economic and tax viewpoint, this partnership took nothing from Respondent which belonged to him prior to its organization; no reallocation, paper or otherwise, of his income was brought about by its organization.

For all of the foregoing reasons it is respectfully submitted that the decision of the Court below should be affirmed.



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APPENDIX

INTERNAL REVENUE CODE:

SEC. 11. NORMAL TAX ON INDIVIDUALS.
There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * * tax * * *.

(26 U.S.C. 1946 ed., Sec 11.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, v ocations, trades, businesses, commerce or sales, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.
Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1946 ed., Sec 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him —

* * * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1946 ed., Sec 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof —

* * * * *

(2) *Partnership and Partner.* The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U.S.C. 1946 ed., Sec 3797.)

SEC. 1141. COURTS OF REVIEW.

(a) Jurisdiction.—The circuit courts of appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in Civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

(c) Powers.—

(1) To affirm, modify, or reserve.—Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

(26 U.S.C. Sec. 1141(a)(c))

28 U.S.C. SEC. 875:

"875. *Review in cases tried without jury.* When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

APPENDIX B

REPRESENTATIVE TAX COURT CASES SHOWING PRACTICE OF DETERMINING FAMILY PARTNERSHIP CASES ACCORDING TO CAPITAL — SERVICES RULE OF THUMB.

Citations are to 1946, 1947 and 1948 Prentice-Hall Memorandum Decisions.

Name	Date	Citation
O. W. Fode	8-9-46	46,199
David O. Davis	10-21-46	46,249
Nestor J. Decker	12-2-46	46,278
J. E. Hurley	2-11-47	47,027
Julias B. Blaek	2-10-47	47,039
W. R. Winchester	3-25-47	47,073
David Paransky	2-20-47	47,038
Margaret Horowitz	6-12-47	47,153
S. E. Boozer	8-28-47	47,248
Camillo Cicinelli	9-30-47	47,264
George Rees	10-24-47	47,288
Robert S. LeSage	12-3-47	47,318
L. W. Seabrook	12-12-47	47,323
Gil Graber	1-14-48	48,001
Robert H. Cole	1-25-48	48,023
Chris Nelson	3-22-48	48,039
Martin Rosol	3-30-48	48,004
Sefer A. Markley	4-14-48	48,056
J. Newman	6-10-48	48,099
Herman Schaeffer	9-13-48	48,181
Arch Martin	10-25-48	48,215
M. M. Monroe	7 T.C. 282	
Edwin F. Sandberg	8 T.C. 423	
Estate Ira L. Berk	7 T.C. 928	
John G. Scherf	7 T.C. 346	

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 313

COMMISSIONER OF INTERNAL REVENUE

vs.

W. O. CULBERTSON, SR.

AND

GLADYS CULBERTSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The undersigned respectfully move this Honorable Court for leave to file the annexed brief as amicus curiae.

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ARTHUR H. KENT,
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BRIEF OF AMICUS CURIAE

The filing of this brief is prompted by the fact that the Solicitor General has asked this Court to construe the cases of *Commissioner* v. *Tower*, 327 U. S. 280 (1946) and *Lusthaus* v. *Commissioner*, 327 U. S. 293 (1946)—as he correctly contends that the Tax Court has construed them—as holding that where an interest in a partnership is donated by a husband (or a father) to his wife (or child) and the donee performs no vital services in the business, the income

must, as a matter of law, be taxed to the donor.[1] This is a question of great public interest and should be settled now by this Court contrary to the Government's contention, regardless of whether or not there are any other reasons for affirming the decision of the Court below.

Secondarily, we are interested in seeing a clear statement from this Court of what we believe to be the proper procedural steps to be taken by Courts of Appeals in reviewing decisions by the Tax Court where the Tax Court's decisions appear to have been grounded upon erroneous principles of law.

A. The Legal Criteria Governing the Taxation of Income of Family Partnerships

1. *The Rule of Thumb Applied by the Tax Court*

In the present case, as in many other cases, the Tax Court has unquestionably construed the *Tower* and *Lusthaus* cases as laying down the proposition here urged by the Solicitor General, namely, that as a matter of law, a family partnership will not be recognized for income tax purposes in the case of any partner who did not contribute "original capital" or perform "vital services." In the present case, the Tax Court has not only applied this erroneous legal test, but has ignored realities in order to compress the facts to fit the legal mold which it has thus established.

That the Tax Court has so construed the *Tower* and *Lusthaus* cases is clear from an examination of the mass of opinions of the Tax Court in which that Court, notwithstanding the great variety of other facts present (on some of which perhaps there might have been adequate proof of a lack of reality of partnership), has applied a rule of thumb that if "original capital" and "vital services" are both lacking, the

[1] On Page 13 of the Petition for Certiorari the Solicitor General refers to the holding in the *Tower* and *Lusthaus* cases as: "This Court's holding in those cases that the incoming partner must actually contribute capital 'originating' with him (or else 'vital additional services') . . ."

wife or child's interest in the partnership will be ignored for tax purposes.[2] The trend of the Tax Court decisions is well analyzed in the Petition for Certiorari in the case of *Hyman Moore* v. *Commissioner*, No. 525, now pending before this Court.

It is apparent from the opinion in the present case that the Tax Court's consideration of this case was grounded upon the same erroneous interpretation of the law.[3]

Thus, while the *Tower* and *Lusthaus* cases applied to "family partnerships" the salutary rule that form could be disregarded in the search for substance or reality, the anomalous result of those decisions is that the Tax Court has in its decisions exalted form at the expense of substance,

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[2] *E.g.*, *M. M. Munroe*, 7 T. C. 278 (1946); *Paul G. Greene*, 7 T. C. 142 (1946); *Floyd D. Akers*, 6 T. C. 693 (1946); *Leonard N. Simons*, 7 T. C. 114 (1946); *John Lang*, 7 T. C. 6 (1946); *James L. Pritchard*, 7 T. C. 1228 (1946); *Edwin F. Sandberg*, 8 T. C. 423 (1947); *Robert H. Cole*, CCH Dec. 16,279 (M) (1948); *Margaret F. Horowitz*, CCH Dec. 15,843 (M) (1947); *Robert S. LeSage*, CCH Dec. 16,163 (M) (1947); *L. W. Seabrook*, CCH Dec. 16,172 (M) (1947); *Gil Graber*, CCH Dec. 16,218 (M) (1948).

[3] *William O. Culbertson, Sr.*, 6 TCM 692 (1947). The Tax Court's espousal of this interpretation is apparent throughout the opinion. For example, the court said:

> "Though the petitioner urges that many cattle businesses are composed of fathers and sons, and that the nature of the industry so requires, we think the same is probably true of other industries where men wish to take children into business with them. *Nevertheless, we think that fact does not override the many decisions to the general effect that partners must contribute capital originating with them or vital services.*" (italics added)

The Tax Court's acceptance of this interpretation and its rigid and mechanical application thereof is clearly manifest also in the cases of *Hartz v. Commissioner*, 170 F. 2d) 313 (C. A. 8th, 1948), *reversing* CCH Dec. 15,775 (M) (1947), in which a petition for certiorari is now pending before this Court (Oct. Term 1948, No. 520) and *Margaret F. Horowitz*, CCH Dec. 15,843 (M) (1947), appeal pending. In each of these cases, the Tax Court denied recognition to a partnership because it failed to satisfy the criteria of "original capital" and "vital services", although the facts found showed that the formation of the partnership was motivated primarily by clear and cogent business considerations.

as, for instance in the present case, holding that an ex parte document executed by one partner was the partnership agreement. The Tax Court has devised a formula—or "specifications for a husband and wife partnership"[4]—which excuses the careful weighing of evidence and permits the application of an over-simplified, rigid test in every case.

2. The Decisions in the Tower and Lusthaus Cases

This Court is now asked to confirm the Tax Court's construction of the *Tower* and *Lusthaus* decisions, and to deny tax effect to all partnerships—however real, and without regard to how large a part capital plays in the production of income—whenever it finds no contribution of capital originating with the wife (or child) and no vital services performed by such partner. Clearly the *Tower* and *Lusthaus* cases do not lay down any such rule.[5] And if any

[4] *Julius B. Black*, CCH Dec. 15,645 (M) (1947).

[5] Shortly after the *Tower* and *Lusthaus* decisions, the proposition was squarely presented to the Court of Appeals for the Fifth Circuit in the case of *Thomas v. Feldman*, 158 F. (2d) 488 (1946). In that case the taxpayers had transferred to trusts, created by them for the benefit of their minor children, certain shares of stock in two family corporations. Subsequently the corporations dissolved and the assets thereof were distributed to the respective shareholders, who organized two limited partnerships. In each of these partnerships, one of the taxpayers was the general and managing partner, and the trusts and other shareholders were limited partners. The court, with one judge dissenting, reversed the District Court and held that partnership income allocated to the trusts was not taxable to the taxpayers. The *Tower* and *Lusthaus* decisions were distinguished on the ground that in each of those cases the Tax Court had made a finding that the wife was not a genuine partner. The Solicitor General did not petition for certiorari.

The Solicitor General refers here to what he calls an "alarming tendency" of late for Courts of Appeals to reverse Tax Court holdings against the validity of family partnerships. The "alarming tendency" represents nothing more than an acceptance of the interpretation adopted in the *Feldman* case, and a realization that the powers of Courts of Appeals are not so restricted as to prevent a reversal of the Tax Court where it has applied the incorrect rule of law which it has drawn from the *Tower* and *Lusthaus* cases.

court should lay down such a rule, it would be guilty of an inexcusable invasion of the legislative field.

In the *Tower* case the majority of the Court concluded its opinion sustaining the Tax Court by stating:

> "Whether the evidence would have supported a different finding by the Tax Court is a question not here presented." (327 U. S. at 292.)

If the Court had intended to hold as a matter of law that the fact that a wife receives her interest in the partnership by gift and performs no vital services will nullify recognition of the partnership, the simple statement of that proposition would have disposed of that case, since admittedly those were the facts. However, the Court went at great length into the subject of the reality of partnerships, and referred to the presence or absence of a contribution of outside capital or vital services only to say that they are circumstances which may properly be taken into consideration in determining whether a partnership is real.[6] In fairness to the Tax Court and to the Solicitor General, however, it should be admitted that Mr. Justice Rutledge, in concurring, criticized the majority for not stating that as a matter of law a decision by the Tax Court in Mr. Tower's favor would have been error;[7] and that Mr. Justice Reed, with whom the Chief Justice concurred in dissenting, felt that the majority opinion could be construed as the Solicitor

---

[6] Mr. Justice Black, speaking for the Court, said:

> "A wife may become a general or a limited partner with her husband. But when she does not share in the management and control of the business, contributes no vital additional service, and where the husband purports in some way to have given her a partnership interest, the Tax Court *may properly take these circumstances into consideration in determining whether the partnership is real within the meaning of the federal revenue laws.*" (italics added) (327 U. S. at 290)

[7] Mr. Justice Rutledge did not state what legal criteria he considered controlling, and he gave no indication that he accepted the rule of thumb which the Solicitor General here urges.

General now contends. We repeat again, however, that this Court enunciated no such principle.[8]

3. *Statutory Provisions Involved*

Upon what statutory provisions is the Tax Court's rule of thumb based? Nothing in the Internal Revenue Code lends the slightest support for the proposition that the gift of an interest in a partnership in which capital is a large income-producing factor leaves the income taxable to the donor and not to the donee who owns the income produced and the property which produced the income. It is interesting to note that in the petition for certiorari and the brief memorandum filed after the granting of certiorari, the Solicitor General does not cite any statutory language whatsoever as a basis for his contention.

Internal Revenue Code, Section 182, which provides for the taxation of the income of members of a partnership, expressly says:

> "Sec. 182. TAX OF PARTNERS.
>
> In computing the net income of each partner, he shall include . . .
>
> (c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in Section 183(b)."

These words make it perfectly clear that the income of a partnership is to be taxed to the person to whom the income is to be distributed.

We will readily concede that this section should be read in the light of the general assumption that partnership in-

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[8] A number of District Judges have construed the *Tower* and *Lusthaus* cases as not laying down the narrow rule which the Tax Court has been applying, and—without objection by the Government—have submitted cases to juries on charges which made taxability depend on the reality of the partnership under all the facts and not on the rule of thumb here urged by the Solicitor General. See, *e.g.*, reports of charges to juries in the following cases: *Knott v. Allen*, 47-1 USTC ¶ 9230; *Mallary v. Allen*, 47-2 USTC ¶ 9399; *Riggs v. Thompson*, 48-2 USTC ¶ 9353.

come is to be distributed in proportion to each partner's bona fide interest in the partnership business, and that where the partnership has been used as a mere device for the allocation of income from personal services to persons who did not perform such services, the rationale of the case of *Lucas* v. *Earl*[9] would justify the Commissioner in requiring a reasonable allocation for salaries before dividing the partnership profits among the partners. But this salutary rule cannot justify any similar refusal to recognize the partnership insofar as the partnership income is due to the capital invested. The rule of *Lucas* v. *Earl* does not violate the basic principle of law that income from property is to be taxed to the owner of the property.

Neither does the *Horst*[10] case or cases following it in any way support the contention which the Solicitor General here makes. The *Horst* case held that an assignment of income from property would not be recognized for income tax purposes where the property itself was not assigned. Certainly in a family partnership case if there were no effective and complete transfer of the partnership property the income from which is at issue, the Commissioner would be justified in taxing the partnership income to the person who retained the partnership property. But in the situation now being considered: (1) there was a completed and bona fide gift of a property interest in a partnership, (2) the partnership income at issue arose subsequent to that gift, and (3) the transferred property interest in the partnership was a substantial income-producing factor. The *Horst* case, if at all relevant to this situation, would support the taxation of the income from the property to the owner thereof.

What the Solicitor General now asks is that a property interest in a partnership be treated differently from any other type of property interest. Not a word in the Internal Revenue Code suggests that the income from a partnership interest which has been donated completely and in good

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[9] 281 U. S. 111 (1930).

[10] *Helvering v. Horst*, 311 U. S. 112 (1940).

faith to a member of a family may be taxed to the donor. And certainly, in the absence of some Congressional expression, no court should assume the authority to lay down such a rule.

4. *Property Interests in Partnerships Compared with Other Property Interests.*

It is clear that where real property or personal property, tangible or intangible, is donated outright and in good faith to a member of the family, the income thereafter arising will be taxed to the donee and not to the donor.[11] It makes no difference whether the property is corporate stock, an office building or a threshing machine.

Nor does it matter whether the donee participates in the management of the property. The donor may continue to manage it as husband or guardian. In fact, the property may be stock of a corporation in which the donor owns the majority of the stock and therefore is in a position legally to direct the management and control of the business to a much greater extent than is true in the ordinary partnership and just as fully as in a limited partnership. Or the donor may transfer the property to himself as trustee for his wife or child, vesting in himself full powers of management, and the income will be taxable to the donee as in the case of an outright gift, so long as the rights retained by the donor out of the bundle of rights which make up the property are not so large as to bring the transfer within the purport of the *Clifford*[12] case and the cases and regulations[13] which follow it. Upon what statutory basis or theory of income tax law a transfer of a property interest in a partnership is to be treated differ-

[11] *Blair v. Commissioner*, 300 U. S. 5 (1937).

[12] *Helvering v. Clifford*, 309 U. S. 331 (1940). In *Harrison v. Schaffner*, 312 U. S. 579 (1940) the owner of property had put it in trust for one year retaining most of the ownership and control and was held taxable during that year. He had given away only a minimum of rights in the property—substantially only the income.

[13] U. S. Treas. Reg. 111, Sec. 29.22(a)-21.

ently, the Solicitor General does not attempt to explain, nor has anyone else attempted to explain it.[14] Certainly no explanation has come from the Tax Court which has done nothing but follow what it conceives to be a rule of thumb laid down in *Tower* and *Lusthaus*.

The opportunity for fraud in family partnerships does not justify the Solicitor General's contention. In all cases of transfers within a family group there is great opportunity for fraud. Many sham transactions are found in the outward cloaks of reality, and this is no less true of transfers within the family group of interests in partnerships than of transfers of other property interests, and probably no more so. And in many cases involving all different sorts of property it is difficult to distinguish the real from the sham. But this fact does not justify a rule of law which will disregard for tax purposes all partnership transfers in the family group any more than it would justify a rule which would disregard all transfers of other property. Until Congress sees fit to pass a statute embodying such a rule of law—which it certainly will not—it is not the function of the courts to create any such rule.

No doubt, as was the situation in the *Tower* and *Lusthaus* cases, although not in the present case, many transfers of family partnership interests have been motivated by a desire to save taxes. But the same is true of transfers of all other sorts of property. If such transfers are apparent and not real, they are properly disregarded. The only im-

[14] It is fundamental in the law that a managing partner is no more free to use property as his own than is a managing trustee. Of course, it is always possible that a father—whether trustee, guardian, partner, or joint tenant—may misuse his position and treat as his own what belongs to a wife or child, and the chances are that he will not suffer the same consequences as if he were dealing with a stranger. But certainly there is no presumption that a father will so violate the law, and Congress has never endorsed any intention to treat the power to violate the law as divesting the interest, for tax purposes or otherwise, of the wife or child. And this consideration would no more justify ignoring the tax results which the statutes attach to partnership activity than the statutory results attaching to activity involving other forms of property.

portance of the tax avoidance motive, where it is present, is for whatever bearing it may have in the determination of the fact of reality or sham,[15] and that is no more and no less in partnership cases than in other cases.

5. *Congressional Attitude on Taxation of Family Partnerships.*

Judicial legislation, even to attain a goal which the court feels certain Congress would achieve, if it considered the problem involved, is entirely unjustifiable under our constitutional system. Moreover, in the family partnership field, there is no indication whatsoever that Congress has ever or would ever approve such an arbitrary rule of law as that the Government here urges. The indications of Congressional opinion that we do have on the subject indicate that Congress would expressly repudiate any such rule of law. Thus the Government's contention would reach a result contrary to the legislative will.

Extensive criticism of the erroneous standards being applied to family partnerships by the Commissioner and the Tax Court was presented to the Ways and Means Committee by the organized Bar and by many other groups and individuals during the hearings that body held recently

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[15] It is well in this field to revert frequently to the language of Judge Learned Hand in *Chisholm* v. *Commissioner*, 79 F. (2d) 14 (C. C. A. 2d, 1935), where he said:

> "*The question always is whether the transaction under scrutiny is in fact what it appears to be in form; a marriage may be a joke; a contract may be intended only to deceive another; an agreement may have a collateral defeasance. In such cases the transaction as a whole is different from its appearance.* True, it is always the intent that controls; and we need not for this occasion press the difference between intent and purpose. We may assume that purpose may be the touchstone, *but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation* . . ." (italics added) (79 F. (2d) at 15).

on the subject of revenue revisions.[16] The American Bar Association's resolutions and statement, which denounced the rules being applied as completely unjustified under the law, are printed as an appendix to this brief.[17] *Supra*, p. 17. Following these hearings, the Ways and Means Committee approved, and the House of Representatives passed, provisions which would eliminate retroactively the Tax Court's rule of thumb. The provisions did not reach the Senate in time for consideration.

The following explanation of these family partnership provisions was made by the Ways and Means Committee:

> "Legislation on family partnerships is deemed necessary because the lower courts and those administering the tax laws have taken the position that the Supreme Court's decision in the *Tower* and *Lusthaus* cases in 1946 limits the recognition of partner status in a family partnership to those who have contributed capital originating with themselves or who have performed vital additional services. At present no question is raised, however, if a husband makes a completed gift to his wife of stock in a family corporation. The gift is recognized, and the dividends paid on the stock are taxed as income to the wife. Nor would the courts or the administrative officials refuse to recognize for income tax purposes the income of a wife from rental property received as a bona fide gift from her husband.
>
> "The bill removes this discrimination with respect to the current and future years and also for open years back to 1941." (H. Rep. 2087, 80th Cong., 2d Sess., p. 10)

Nor has criticism been limited to the House of Representatives. Debate on the floor of the Senate on May 27 and May 28, 1947, showed a general disapproval of the position which the Commissioner and Tax Court have

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[16] *See, e.g., Hearings before the Committee on Ways and Means on Revenue Revisions 1947-48*, 80th Cong., 1st Sess. (1947) 3199-3200, 967-969, 898, 903, 939-940, 3599.

[17] *Ibid*, pp. 3344-46, 3360.

taken.[18] This disapproval was voiced by leaders on both sides of the issue involved in that particular debate.[19]

It is most fortunate that the question of family partnerships is again before this Court before further statutory provisions have been added to the Internal Revenue Code to cover a group of situations which can readily be handled by the administrators and the courts under the present statutory provisions if properly interpreted.

B. The Proper Review of Tax Court Decisions Where Tax Court Has Applied Erroneous Principles of Law

Assuming as we do that this Court will not approve the construction which the Tax Court has placed on the *Tower* and *Lusthaus* cases, the question then arises as to the proper duty of a Court of Appeals on an appeal from the Tax Court, where the Tax Court has proceeded upon erroneous legal premises. The question involved is a fundamentally important one, and this court should make its answer clear.

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[18] See, *e.g.*, 93 Cong. Rec. 5987, 5988 (May 27, 1947); 93 Cong. Rec. 6069, 6070, 6071, (May 28, 1947).

[19] For example, Senator George, now Chairman of the Senate Finance Committee and Chairman of the Senate Finance Committee for a number of years prior to the 80th Congress, said:

> "The Treasury has very vigorously pushed the cases against the so-called family partnerships. *I think, and I have said so to the Treasury, and I have said so openly in the hearings in the Finance Committee, that they have gone entirely too far.* . . . If the husband makes money and pays all the taxes due upon that money, and if after having paid his taxes he wishes to give the wife an interest in a partnership business or give her money which she puts into that partnership business, there should not be laid down in those cases the narrow test which our courts, I regret to say, have recognized, to wit, whether the wife actually contributed anything by way of work or by way of attention or by way of management of the business. *That ought not to have been the test.* (italics added) 93 Cong. Rec. at 6071 (May 28, 1947)

Findings of fact on disputed evidence and the factual inferences to be drawn from the primary facts are obviously for the Tax Court. Where the findings and inferences are such as could reasonably have been reached on the basis of the evidence, the Tax Court, like a District Court, should be sustained on appeal even though the appellate court might have reached a different conclusion in a trial *de novo*. However, an entirely different question is presented where in determining the so-called ultimate fact of the case—in these cases the "reality" of the partnerships—the lower tribunal has proceeded upon erroneous principles of law and has not attempted to determine "reality" as a fact but has proceeded only to find out whether the subsidiary facts of the cases are such as to bring the alleged partnerships within an incorrect principle of law.

In this situation, of course, the ultimate finding is ambiguous, and the appellate court must either (1) remand the case to the trial court with directions to the trial court to determine the facts in the light of the proper legal principles, or, (2) make its own findings of fact. Generally, where the facts are so clear that only one conclusion can be reached by the trial court the case may be finally decided by the appellate court; otherwise the case should be remanded for findings in the light of the correct legal principles laid down by the appellate court. In many cases coming from the Tax Court these procedural principles have been ignored.

One of the duties of an appellate court, especially in the tax field where litigation is so prolific, should be to require the trial court (here the Tax Court, which is required to make findings of fact and conclusions of law) to word its findings and conclusions so as to make the basis of its ultimate decision clear. If the Tax Court opinion is ambiguous as to whether the decision is based upon erroneous principles of law, the appellate court should remand the case for the necessary clarification. Frequently

this is the only procedure which will insure fairness to the litigants and clarify the law for the future.[20]

In the principal case, which clearly proceeded upon an erroneous principle of law, there is no question but that the court below should be reversed. From the brief consideration which we have given to the facts in this particular case, it would seem that the Court of Appeals was correct in deciding the ultimate issue. But the least that it could have done, was to reverse and remand with directions that the Tax Court consider the final question in the light of the correct legal principles applicable.

Conclusion

Confusion and injustice have resulted from a misinterpretation by the Tax Court of this Court's opinion in the *Tower* and *Lusthaus* cases. A clear statement of the correct principles by this honorable Court would relieve the present congestion in the administrative handling of these cases and permit a fair trial of them before any tribunal. It is also important that this Court recognize the power of Courts of Appeals to reverse the Tax Court in any case where the Tax Court makes an ultimate finding of "fact" through the application of erroneous principles of law.

Respectfully submitted,

WILLIAM A. SUTHERLAND,
ARTHUR H. KENT,

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[20] This procedure was followed by the Court of Appeals for the Fifth Circuit in the case of *Mitchell v. Commissioner*, 118 F. (2d) 308 (C. C. A. 5th, 1941), *reversing and remanding* 40 B. T. A. 424 (1939). In that case, the Court of Appeals could not tell from the Tax Court's decision the basis of the Tax Court's ultimate conclusion of fraud. It was not clear whether the Tax Court intended to conclude from the facts that the taxpayer knew that his income tax return was false when he filed it, or whether the Tax Court felt that the fraud could be based upon the gross negligence of the taxpayer. Upon remand, the Tax Court reversed its ultimate finding in the light of the pertinent questions asked by the Court of Appeals.

APPENDIX

Resolutions and Statement of the American Bar Association Dealing With Tax Status of Family Partnerships, Presented to the Ways and Means Committee of the House of Representatives on December 8, 1947.

(Quoted from *Hearings Before Committee on Ways and Means on Revenue Revisions, 1947-48*, 80th Cong., 1st Sess. (1947), 3344-46)

10. *Federal income tax—Clarification of tax status of so-called family partnerships.*

The tenth resolution is as follows:

"*Resolved*, That the American Bar Association recommends to Congress that the provisions of the Internal Revenue code relating to the definition of partnerships be amended to clarify the income tax status of so-called family partnerships, in accordance with the generally recognized principle that the income from purchased or donated property is taxable to the bona fide purchaser or donee of such property; and be it further

"*Resolved*, That the association proposes that this result be achieved by amending section 3797 of the Internal Revenue Code; and be it further

"*Resolved*, That the officers and council of the section of taxation are directed to urge the following amendment or its equivalent in purpose and effect, in the proper committees of Congress:

"'Section 3797 (a) (2) of the Internal Revenue Code is hereby amended by adding thereto after the period at the end thereof the following:

"'"If a person is otherwise recognized by law as a bona fide partner or joint venturer, he shall be considered a partner for the purpose of this title if he has contributed capital or substantial personal services to the partnership. For the purpose capital shall be deemed to include any money or other property (including an interest in the partnership or in a predecessor business) acquired at any time from any other person by bona fide purchase or gift. If in any case, however, the interest of any partner was acquired, directly or indirectly, from another person, and if the partner is a spouse, brother or sister (whether by the whole or half blood), ancestor or lineal descendant of such other per-

son, or if the partner is a trust of which such other person is the grantor,

> "'"(i) if such other person has an investment in the partnership, the proportion which the acquiring partner's distributive share of partnership income bears to his capital shall not exceed the proportion which such other person's distributive share of partnership income bears to such other persons's capital (unless such excess is attributable to personal services actually rendered by the acquiring partner), and any excess shall be considered additional income of such other person; and
>
> "'"(ii) if the partnership agreement requires the distributive shares of partnership income to be determined without reasonable allowance for personal services rendered by such other person, there shall be attributed to such other person an amount not in excess of reasonable compensation for such services, and there shall be deducted from the distributive share of the acquiring partner his proportionate share of such amount."'"

Comment

It is a basic principle of income taxation that income derived from property is taxable to the bona fide owner of that property, whether such ownership was acquired by purchase or by gift, and whether it was acquired from a stranger or from a relative. The Supreme Court has never questioned this basic principle. Nevertheless in *Commissioner* v. *Tower* (327 U. S. 280 (1946)), and *Lusthaus* v. *Commissioner* (326 U. S. 293 (1946)), the court stated that a partnership between husband and wife, valid under local law, may be disregarded for income tax purposes if the partnership is not "real." Moreover, the court indicated that one of the criteria which the Tax Court can consider in determining "reality" is whether or not the property contributed by the wife "originated" with her. The Tax Court has apparently interpreted these decisions to mean that a partnership is invalid unless the wife renders substantial services or unless she has contributed "original" capital. The Tax Court has apparently considered it immaterial that capital is itself a significant income-producing factor in the business, and that the wife may be the absolute owner of

part of that capital even where she derived the capital originally by gift from her husband.

The fundamental fallacy of the rule presently being applied by the Tax Court is indicated by some of the distinctions which the courts have been forced to make in its application. For example, if the husband made a gift to his wife before the partnership was contemplated, and if the wife subsequently contributes this gift as her partnership capital, the wife's partnership interest is recognized for tax purposes (*S. E. Boozer*, C. C. H., T. C., Dec. 16,008 (M) (Aug. 28, 1947)). But if the same gift consists of capital in an existing business, the entire partnership income is taxed to the husband (*Commissioner v. Tower*, supra). Where the wife purchases her interest from another partner of the husband, her interest is recognized for tax purposes, even though she has borrowed part of the purchase price on the husband's collateral (*S. Kenneth Alexander*, 6 T. C. 804 (1946)). Where, however, the wife purchases her interest directly from the husband, the partnership is invalid and all of the partnership income is taxed to the husband where the loan is to be repaid from the partnership income (*Lusthaus* v. *Commissioner*, supra; *W. A. Belcher*, 7 T. C. 182 (1946), affirmed, 162 F. (2d) 974 (C. C. A., 5th, 1947)). On another aspect of the problem, the courts are in conflict as to whether capital contributed by the wife before the formation of the partnership is sufficient to validate the partnership (*Singletary* v. *Commissioner*, 155 F. (2d) 207 (C. C. A. 5th, 1946)), reversing 5. T. C. 365 (1945); cf. *Thorroz* v. *Commissioner*, 155 F. (2d) 791 (C. C. A. 6th, 1946)).

In one case, income of an "invalid" partnership was distributed to the wife; she used this income to purchase property which she leased to the partnership for a fair rental. The Tax Court held that, although the original partnership income was taxable to the husband, the rental income was taxable to the wife (*Abe Schreiber*, 6 T. C. 707 (1946), affirmed, 160 F. (2d) (C. C. A. 6th, 1947)). On the other hand, if the wife allows her income to remain in the partnership, even the subsequent earnings attributable to such income are apparently taxable to the husband (*Margaret F. Horowitz*, C. C. H. T. C. Dec. 15, 843 (M) (June 12, 1947); cf. *Durwood* v. *Commissioner*, 159 F. (2d) 400 (C. C. A. 8th, 1947)). It has been emphasized in many cases that the "tax avoidance" purpose of the gift is the essential

weakness. See *Scherf* v. *Commissioner*, 161 F. (2d) 495 (C. C. A. 5th, 1947). Yet, the Tax Court has refused to recognize a partnership even where it has found that the partnership was formed solely for business reasons (*Margaret F. Horowitz*, supra).

These examples are not cited to demonstrate a need for statutory refinements of the problem. Starting with the fundamental fallacy, the courts have been struggling as well as they can to draw intelligent distinctions. The examples simply illustrate the kind of finespun logic which is the inevitable result of a fallacious premise. What is needed is a basic statutory correction of the fundamental error.

Such a correction might at first thought seem to be a simple matter. Several simple proposals have been advanced. One would recognize any partnership which is valid under local law. Another would simply recognize the validity of donated capital. However, in the opinion of a majority of those considering the problem, the tangled history of this issue makes such simple solutions undesirable. If the "family partnership" rule had developed in conformity with the basic principles of income-tax law, and without the confusion created by decisions such as those in the Tower and Lusthaus cases, supra, no specific statutory provision should have been required to enable the Bureau and the courts to have created adequate safeguards against unjustifiable tax avoidance. A blanket statutory recognition of all partnerships in the 1948 general tax revision, however, might have the effect of eliminating such safeguards as would have been developed. The recommended amendment of the bar association, therefore, specifically sets forth the following safeguards:

1. The wife (or other family member) must contribute either capital or substantial personal services. The wife, therefore, may not have income diverted to her as a partner in a purely personal service business unless she actually renders substantial services.

2. If the wife's capital was acquired from the husband, it must have been by bona fide purchase or gift. If the husband retains such "strings" as to negate the wife's ownership, the wife's interest is not recognized. But the extent of the wife's ownership is determined by State law, and not any separate criteria of the Federal tax law.

3. Income derived from capital may not be shared in substantial disproportion to capital accounts. That is, the

husband may not give the wife a 10-percent interest in the capital of the business, and divert to her 50 percent of the income.

4. Income derived from the husband's personal services may not be deflected to the wife. If the husband renders personal services to the partnership, and if the partnership agreement makes no provision for reasonable compensation, the Commissioner may allocate a reasonable salary to him before accepting a division of the business income.

It is believed that the statute recommended by the bar association is a fair statement of the law as it existed prior to the Tower case, that it merely reestablishes that law, and that it is in harmony with the general principles of income taxation.